No. 90-1684

Supreme Court, U.S.
FILED
MAY 2 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT P. BREWER, Natural Guardian and Duly-Appointed Next Friend of ROBERT C. BREWER,
Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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KS Printing Co. 1991

QUESTIONS PRESENTED

This case involves the standard for interpretation of ambiguous terms in an "employee welfare benefit plan" under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. At issue is the proper interpretation under ERISA of the terms "mental illness" and "psychiatric care," when those terms are used but not defined in a group health insurance policy. Resolution of this issue will determine whether the several million victims of bipolar affective mood disorder, also known as manic depression, an organically based physical dysfunction caused by a chemical imbalance in the brain, are entitled to coverage under the "major medical" provisions of most health insurance policies or instead are limited to the vastly reduced benefits payable under separate "mental illness" provisions.

I.

The first question presented is whether ERISA nullifies the decisional law of all fifty states and the District of Columbia, the contra insurer rule, which regulates insurance by requiring that ambiguous terms in health insurance policies -- in this case, the terms "mental illness" or "psychiatric care" -- be construed in favor of the insured participants and beneficiaries and against the insurer.

II.

If Missouri's contra insurer rule is nullified by ERISA, the second question presented is whether the federal common law of ERISA should adopt or incorporate the contra insurer rule, so that ambiguities in health insurance plans subject to ERISA will be construed in favor of the insured participants and beneficiaries of the plan and against the insurer.

LIST OF PARTIES

In the proceeding below Robert P. Brewer, natural guardian and duly-appointed next friend of Robert C. Brewer, and the Lincoln National Life Insurance Company were the only parties. The Health Insurance Association of America, however, appeared before the Eighth Circuit as amicus curiae in support of Lincoln National Life Insurance Company.

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ROBERT C. BREWER,

Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Robert P. Brewer, natural guardian and duly appointed next friend of Robert C. Brewer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. A, *infra*, A-1 to A-7) is reported at 921 F.2d 150. The opinion of the district court, (App. B., *infra*, A-8 to A-21) is reported at 730 F. Supp. 292.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on December 7, 1990. On February 23, 1991 this Court extended the time for filing a petition for writ of certiorari to and including April 8, 1991. On March 29, 1991 this Court further extended the time for filing a petition for writ of certiorari to and including May 3, 1991.

Petitioner seeks this Court's review pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this Title and not exempt under Section 1003(b) of this Title.

29 U.S.C. § 1144(b)(2) provides:

> (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this Title, which is not exempt under section 1003(b) of this Title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any state purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

STATEMENT OF THE CASE

1. Introduction. The issues in this case affect millions of people who have bipolar affective mood disorders, also known as "manic depression." Persons with such disorders have been forced to bear health insurance benefit reductions or denials, based on interpretations of unclear and ambiguous policy language by insurers that have wrongly classified these disorders as "mental illnesses." *See* Brief Of National Depressive And Manic Depressive Association As Amicus Curiae In Support Of Petition Of Robert P. Brewer For Writ Of Certiorari. Both of the questions presented by this petition raise the issue of whether the contra insurer rule -- the rule of every state and the District of Columbia which holds that ambiguous terms in an insurance policy are construed in favor of the insured and against the insurer -- applies to a health insurance policy governed by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974), *codified at*, 29 U.S.C. § 1001 et seq. (1986) ("ERISA").

Petitioner contends that respondent's insurance policies contained the ambiguous terms "mental illness" and "psychiatric care." Those terms were undefined in successive group health insurance policies, that were purchased from respondent by petitioner's employer for the benefit of

petitioner and other employee participants and beneficiaries. App. B at A–10 to A–12, 730 F. Supp. at 293–94. Under the pertinent insurance policies "psychiatric care" and other treatment of a "mental illness" was excluded from respondent's liberal "major medical" policy coverage. Instead, respondent's insurance policies allowed coverage for such treatment only to the extent of significantly reduced "mental illness" benefits. App. B at A–10, 730 F. Supp. at 293.

Resolution of the ambiguity in the applicable policy depends on whether the term "mental illness" should be defined by the diagnostic *cause* of the illness or the manifested *symptoms* thereof. Likewise, resolution of the ambiguous term "psychiatric care" depends on whether the term relates to any treatment which *necessarily* must be done or directed by a psychiatrist as treatment for a "true" mental illness, as opposed to any treatment *merely rendered* by a psychiatrist regardless of the nature and etiology of the underlying problem. A classification of "mental illness" based on *symptoms* leads to a much broader exclusion from coverage under almost all health insurance policies than does a classification based on the *cause* of the disorder. Likewise, a classification of "psychiatric care" based on whether a psychiatrist *happened to provide* the treatment leads to a far greater exclusion of treatments from major medical coverage than would a classification based on whether the treatment *necessarily* had to be ordered by a psychiatrist.

Petitioner's son, Robert C. ("Rob") Brewer, suffered from affective mood disorder, an illness with symptoms such as mood swings and depression that can be symptomatic of mental illness. App. B at A–13 to A–15, 730 F. Supp. at 294–295. Nevertheless, as the evidence at trial showed (and which the appeals court ignored), the illness is caused not by

environmental[1] effects, but instead by an organically based dysfunction that arises from a chemical imbalance in the brain. App. B at A-13 to A-16, 730 F. Supp. at 295-96. Generally, organically caused illnesses, such as brain cancer and Alzheimer's disease, have not traditionally been categorized as "mental illnesses" even though they affect the brain. App. B. at A-19 to A-20, 730 F. Supp. at 297-98. How a particular disorder is classified determines whether health insurance companies like respondent pay full "major medical" benefits, rather than the vastly reduced benefits payable under "mental health" or "mental illness" provisions. *See* App. B at A-21, 730 F. Supp. at 298 (full benefits for "affective mood disorder" when "mental illness" classified by cause). *Cf.* App. A at A-7, 921 F.2d at 154 (reduced benefits for same disorder when "mental illness" classified by symptoms).

Similarly, although psychiatrists frequently treat bipolar affective mood disorder, they need not necessarily do so. An internist or family practitioner is also qualified to treat the illness by drug therapy. Trial Transcript at 123-24, 126, 144. Accordingly, another issue under the policy is whether the exclusion that provides reduced benefits for "psychiatric care" is limited to treatment that *only* a psychiatrist could have provided, or instead includes treatment that *could* have been provided by an internist or family practitioner.

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[1]As used in this petition, an "environmental" cause of mental illness relates to "traumatic experiences or childhood relationships" or other such behavioral causes. App. B at A-19 to A-20, 730 F. Supp. at 297-98 (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp. 1342, 1347 (C.D. Cal. 1988)). As thus defined, a behavioral, "environmental" cause of an illness is to be distinguished from a physical, organically based, "environmental" cause of mental illness, such as lead poisoning or over-exposure to industrial chemicals.

2. Proceedings in the District Court. Petitioner filed suit in the United States District Court for the Eastern District of Missouri to challenge respondent's exclusion from coverage of certain claims made by petitioner under a group health insurance policy and a successor policy that constituted employee welfare benefit plans under ERISA. Petitioner was a covered "participant" under the plans and his son was a beneficiary. After a one-day bench trial the district court, the Honorable William L. Hungate, Judge, issued findings of fact and conclusions of law.

Petitioner's son was hospitalized and treated on three occasions for "severe affective mood disorder." App. B at A-13, 730 F. Supp. at 294. The parties stipulated that the charges for these hospitalizations were reasonable and that the treatment rendered was reasonably necessary to treat the son's condition. *Id.* The parties further stipulated that the disputed charges would fall within and be fully paid under the "major medical" policy provisions, but for their exclusion under the "mental illness" provisions of those same policies.[2] App. B at A-10, 730 F. Supp. at 293.

The policy exclusions from "major medical" coverage for "mental illness" were written differently in each policy, and in both policies the term "mental illness" was not defined. App. B at A-11, A-12, 730 F. Supp. at 294. The first policy also limited coverage for treatment of "psychiatric care" in

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[2]Respondent paid for coverage only up to the limit of the "mental illness" provisions which left an uncovered deficiency of over $55,000 in expenses that were the responsibility of petitioner to pay. The deficiency under the first policy was $31,240.38; under the second policy it was $24,672.49. App. B at A-13, 730 F. Supp. at 294.

the same provision that limited coverage for "mental illness."[3] The term "psychiatric care" was also left undefined. The district court found that under the first policy, Rob Brewer's receipt of "psychiatric care" was sufficient to come within the scope of the "mental illness" exclusion and therefore denied recovery under the first policy. App. B at A-18, 730 F. Supp. at 297.

The second policy again left "mental illness" undefined, and also lacked any reference to "psychiatric care."[4] The

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[3]The district court quoted the pertinent portions of the first policy as follows:

> *Mental Illness, Substance Abuse and Alcoholism*
> Charges for treatment of mental illness(es), functional nervous disorder(s) of any type or cause, substance abuse, alcoholism, or for psychiatric or psychoanalytic care for any reason are covered as follows: [limitations specifically set forth in policy omitted.]

App B. at A-10 to A-11, 730 F. Supp. at 293-94. The only definitions in the first policy stated that: "'Illness' or 'Sickness' means a bodily disorder or disease, pregnancy, mental infirmity or bodily injury." App. B at A-11, 730 F. Supp. at 294.

[4]The district court quoted the following pertinent portions of the second policy:

MAJOR MEDICAL LIMITATIONS

> The maximum payment for care of mental illness, nervous conditions of any type or cause, substance abuse or outpatient treatment of alcoholism, by a doctor will not be more than [limitations omitted.]

second policy's exclusion from "major medical" coverage applied to "care of *mental illness*, nervous conditions of any type or cause, substance abuse or outpatient treatment of alcoholism...." App. B at A-11 to A-12, 730 F. Supp. at 294 (emphasis added).

The district court found that ERISA did not provide assistance in interpreting the second policy's "mental illness" exclusion, and therefore referred to state law "for guidance in ascertaining the principles applicable to the ERISA action." App. B at A-17, 730 F. Supp. at 296. Finding the policy term ambiguous, the district court applied Missouri's contra insurer rule and ruled that the ambiguous coverage restriction for "mental illness" should be construed in favor of the insured and against the insurer. App. B at A-17 to A-21, 730 F. Supp. at 296-98. *But see* App. A at A-4 n.1, 921 F.2d at 153 n.1 ("We cannot tell whether or to what extent the contra insurer rule affected the district court's opinion....").

In construing the undefined policy term, "mental illness," in favor of the insured, the district court adopted a definition that included only behavioral disturbances with "no demonstrable organic or physical basis," and which stemmed "'from reaction to environmental conditions as distinguished from organic causes.'" App. B at A-19, 730 F. Supp. at 297 (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp.

> For treatment of mental illness or substance abuse, charges are limited to [limitations omitted].

App. B at A-11 to A-12, 730 F. Supp. at 294. The second policy also included a maximum, aggregate lifetime benefit "for charges for mental illness(es), substance abuse or outpatient treatment of alcoholism. *Id.* This policy did define "illness" as "1. A disorder or disease of the body or mind; or 2. An accidental bodily injury; or 3. Pregnancy." *Id.*

1342, 1346-47 (C.D. Cal. 1988). Based on the definition adopted from ***Kunin*** and the reasoning therein, the district court concluded that bipolar affective mood disorder is not a "mental illness" within the meaning of respondent's insurance policy. The district court found that the

> evidence credibly establishe[d] that the severe disorder affecting Rob Brewer stemmed most probably from a chemical imbalance in his brain, rather than from environmental factors such as a traumatic experience or a parental relationship. While the disorder is described through its symptoms, that in and of itself does not render it a "mental illness" as defined by this Court.

App. B at A-20, 730 F. Supp. at 298.

3. Proceedings in the Court of Appeals. The Eighth Circuit reversed.[5] Finding that the district court erroneously concluded that the contra insurer rule applied, the Eighth Circuit held that Missouri's contra insurer rule "does not regulate insurance and is preempted by ERISA." App. A at A-3 to A-5, 921 F.2d at 153. As support for rejection of the contra insurer rule, the court of appeals relied upon this Court's admonition in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that disputed language be construed "without deferring to either party's interpretation." App. A at A-5 to A-6, 921 F.2d at 154.

After rejecting the Ninth Circuit's reasoning in *Kunin*, the guidance of state law and the contra insurer rule, the court of

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[5]The court of appeals affirmed the district court's denial of benefits with respect to the first policy, but based its affirmance on the policy's exclusion for "mental illness." The Eighth Circuit therefore did not address the district court's analysis of the term "psychiatric care." App. A at A-7 n.3, 921 F.2d at 154 n.3.

appeals fashioned its own federal common law principles for interpreting the term "mental illness." The court of appeals concluded that "[i]t would be improper and unfair to allow experts to define terms that were specifically written for and targeted toward laypersons." App. A at A-6, 921 F.2d at 154. In reversing the district court's decision that "mental illness" under the policy at issue was to be defined by its causes and not by its symptoms, the Eighth Circuit panel relied on its own conception of how laypersons understand the term "mental illness," and not on the evidence in the district court. App. A at A-6 to A-7, 921 F.2d at 154.

Because the policy did not specifically limit the definition of "mental illness" to "only those illnesses that have a non-organic origin," the court of appeals essentially concluded that the "mental illness" exclusion from coverage, though undefined, should be construed broadly. The court stated:

> By focusing upon the disease's etiology, the district court considered factors that are important to experts but not to laypersons. The court thus failed to examine the term "mental illness" as a layperson would have, which is the examination we conclude ERISA and federal common law require.

App. A at A-7, 921 F.2d at 154.

The court of appeals reached this conclusion notwithstanding a directly conflicting Ninth Circuit decision. App. A at A-6 n.2, 921 F.2d at 154 n.2. *See Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539-40 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990). "We expressly disagree with our sister court's conclusions and decline to follow *Kunin*." App. A at A-6 n.2, 921 F.2d at 154 n.2.

The issues in this case thus address the proper standard for interpretation of ambiguous terms in health benefit plans

governed by ERISA, when the insurance company that wrote the policy did not define the terms. In framing a rule of construction for ambiguous terms in ERISA plans, in this case the terms "mental illness" or "psychiatric care," the Eighth Circuit rejected the universally held rule that ambiguous terms in insurance policies should be construed in favor of the insured and against the insurer.

REASONS FOR GRANTING THE WRIT

In direct conflict with the decision of another court of appeals, the Eighth Circuit rejected the contra insurer rule and *broadly construed ambiguous exclusionary limitations on coverage* in an ERISA welfare benefit plan to the detriment of plan participants and beneficiaries. The decision thwarts the express purpose of ERISA, as expressed by its statutory language and the decisions of this Court, and incorrectly decided questions of great importance to the administration of employee welfare benefit plans throughout this nation. If not reviewed and reversed by this Court, the standard for interpretation adopted by the Eighth Circuit, will frustrate the very purpose for the enactment of ERISA, i.e., the protection of employees and beneficiaries, while decreasing the responsibility of fiduciaries below that which they would otherwise have had under the law prior to the enactment of ERISA.

I. This Case Involves Questions Of Great Importance To The Construction And Interpretation Of *All* ERISA Plans, Not Just Those Affecting The Several Million Persons Afflicted With Bipolar Affective Mood Disorder

The implications of this decision are significant. Limited to the facts of this case, the decision threatens the ability of several million Americans to obtain adequate treatment of a long misunderstood but now treatable, organically based,

physical disease that manifests itself with symptoms of mental disorder. "[T]ens of thousands of other policies issued as part of employee benefit plans [provide] lesser benefits for 'mental illnesses' than for other illnesses." Brief of Amicus Curiae Health Insurance Association of America at 2, *Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990) (hereinafter "Brief of Health Ins. Assn. of America"). In addition to the significance of this case to the large number of persons affected by its specific fact pattern, the legal principle has even broader importance.

By addressing the question of whether the contra insurer rule of every state and the District of Columbia is preempted by ERISA, and if so, by addressing whether the contra insurer rule should be incorporated into the federal common law of ERISA, the questions presented in this case have dramatic effects upon the interpretation and coverage of *all* employee welfare benefit plans throughout the nation. The Eighth Circuit decision extends far beyond the narrow issue of how to interpret the undefined term "mental illness." The Eighth Circuit's refusal to recognize the contra insurer rule's applicability to ERISA welfare benefit plans, whether by reference to state law or by incorporation into federal common law, contravenes ERISA's primary purpose -- the protection of employee benefit plan participants and beneficiaries. That aspect of the Eighth Circuit's decision extends the impact of its erroneous decision far beyond the several million persons affected with bipolar affective mood disorder. The decision threatens the benefits of every ERISA insurance plan participant and beneficiary in this country, because it involves a general rule of construction that is applicable to *all* ERISA insurance plans.

Despite the obvious importance of this case, petitioner acknowledges that respondent may oppose the issuance of a writ of certiorari given the outcome of the Eighth Circuit decision. Any opposition to certiorari by respondent more likely results not from a lack of importance of the issues, but

from a tactical desire to contest these controversies case by case -- against individual beneficiaries who, for either financial or health reasons, are ill equipped to litigate against giant insurance companies. This dispute is too important to be resolved by individual battles on such an uneven playing field. Accordingly, this Court should grant a writ of certiorari now and clarify the confusion arising from the conflict in the circuits on this important issue.

The Eighth Circuit decision attempted to ascertain an appropriate federal common law principle to aid in the interpretation of ERISA. In effect, the decision lessens the protections that formerly existed for participants and beneficiaries of group health insurance policies before passage of ERISA. In that respect the Eighth Circuit decision implicitly conflicts with the result in *Firestone Tire & Rubber Co. v. Bruch*, which declined to adopt a position which would give insurance policy beneficiaries less protection than they had before the enactment of ERISA. *See Bruch*, 489 U.S. 101, 113-14, 109 S. Ct. 948, 956 (1989).

Paradoxically, the Eighth Circuit cited *Bruch's* reference to the common law of trusts as an aid in interpreting ERISA. App. A at A-5 to A-6, 921 F.2d at 153-54 (citing *Bruch*, 489 U.S. at 114). The Eighth Circuit's analysis and application of the trust law analogy in *Bruch* is faulty for reasons set forth *infra*. To the extent that the issues of this case implicate trust law, the appropriate analogy would be to respondent as a plan fiduciary with a significant conflict of interest. The consequences of the Eighth Circuit's ill-advised decision are so significant that this Court should grant a writ of certiorari to correct the panel decision.

While it might be correct under *Bruch* for the Eighth Circuit to review the district court's conclusions *de novo*, the Eighth Circuit erred in failing to consider the relative position of the parties. In *Bruch* this Court specifically alluded to the

need to consider whether a plan administrator or fiduciary "is operating under a conflict of interest." *Bruch*, 489 U.S. at 115. Under accepted rules of trust law, a finding that a fiduciary has a conflict of interest "has a tremendous impact on the evaluation of the fiduciary's actions." *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1565 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991).

Both *Bruch* and *Brown* addressed the differing standards that apply under ERISA when a fiduciary has a conflict of interest. The finding of a conflict of interest "must be weighed as a 'facto[r] in determining whether there is an abuse of discretion'" by the fiduciary. *Bruch*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187, Comment *d* (1959)). *See Brown*, 898 F.2d at 1562-68. *Brown* specifically identified and discussed the conflict of interest faced by an insurance company that "serves as the decisionmaking fiduciary for benefits that are paid out of the insurance company's assets." 898 F.2d at 1561.

> Decisions made by the issuing [insurance] company on behalf of a[n ERISA] plan based on a contract of insurance, by contrast, inherently implicate the hobgoblin of self-interest. Adverse benefits determinations save considerable sums that are returned to the fiduciary's corporate coffers. The presumption that the fiduciary is acting for the future stability of the fund cannot be entertained.

Id. at 1568.

The conflict of interest faced by an insurer making benefits determinations illustrates why courts uniformly construe ambiguous provisions of an insurance policy in favor of the insureds and against the insurer. Just as trust law principles shift the burden to a fiduciary with a conflict of interest, the contra insurer rule shifts the burden to the insurer

who has a similar conflict of interest when making benefit determinations that involve ambiguous terms in the insurer's own policy. The Eighth Circuit's rejection of this principle defies understanding, particularly in light of this Court's discussion of the distinctions between pension and welfare benefit plans under ERISA, and especially "insured plans." *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

Accordingly, given the importance of establishing whether the contra insurer rule applies to ERISA insurance plans, this Court should grant a writ of certiorari.

II. This Court Should Resolve The Conflict In The Circuits By Granting A Writ Of Certiorari To The Eighth Circuit.

This Court should also grant a writ of certiorari to end the confusion which exists as a result of the conflict between the Eighth Circuit's decision below and the Ninth Circuit's decision in *Kunin*. The confusion harms the insureds and their beneficiaries as well as the insurers who provide this kind of insurance. An amicus curiae in support of the respondent, the Health Insurance Association of America, argued the importance of *predictability* before the Eighth Circuit. "As with any form of insurance, a *predictable allocation of risk and costs*, based upon historical patterns of claim payments, *is essential* to the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events, such as illness and disability." Brief of Health Ins. Assn. of America at 2 (emphasis added). To assure predictability in the administration of ERISA plans and to clarify the confusion arising from the conflict in the circuits, this Court should grant a writ of certiorari in this case.

A. The Conflict Among The Circuits Requires Resolution By This Court Of Whether ERISA Preempts The Decisional Rule Of Construction In Every State And The District Of Columbia That Ambiguous Terms In An Insurance Policy Are Construed In Favor Of The Insured And Against The Insurer.

The Eighth Circuit's decision that ERISA preempts the contra insurer rule is in direct conflict with the Ninth Circuit's decision in *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539–40 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990). *See* App. A at A–6 n.2, 921 F.2d at 154 n.2 ("We expressly disagree with our sister court's conclusions and decline to follow *Kunin*.").

The Ninth Circuit acknowledged that ERISA controlled the interpretation of an employee welfare benefit plan, *Kunin*, 910 F.2d at 539, but noted that state law can control "either because Congress intends courts to look to state law, or because the incorporation of state law into the federal common law is 'appropriate as a matter of judicial policy.'" *Id.* (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986)). According to the Ninth Circuit, the contra insurer rule was applicable, "regardless of whether it applies as a matter of uniform federal law or because federal law incorporates state law on this point." *Id.* at 540.

This Court has previously held that when Congress passed ERISA, it set out to "*'protect... participants in employee benefit plans and their beneficiaries....'*" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987) (emphasis added) (quoting 29 U.S.C. § 1001(b)). "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Moreover, this Court also stated that Congress' purpose in passing ERISA's preemption provisions, ERISA § 514, 88 Stat. 897, *codified*

at, 29 U.S.C. § 1144 (1986), was *to ensure uniformity in interpreting ERISA* -- so that employers would not face "the threat of *conflicting or inconsistent* State and local regulation of employee benefit plans." *Shaw*, 463 U.S. at 46 (quoting 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams)). Nevertheless, Congress also passed section 514(b)(2)(A) of ERISA, 29 U.S.C. § 1144(b)(2)(A) ("the saving clause"), which exempts from preemption and "preserves any state law 'which regulates insurance....'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (quoting the saving clause).

Looking to state law for guidance in interpreting ambiguous provisions of employee welfare benefit plans comports with the language and purpose of ERISA for two reasons. First, *every state and the District of Columbia employs the contra insurer rule* that ambiguities are construed in favor of the insured and against the insurer. *See Kunin*, 910 F.2d at 538-39 & n.6 (citing several treatises in support). Thus, given the states' unanimity in adopting the contra insurer rule, ERISA's goal of promoting uniformity is met. Likewise, the protective effect of the contra insurer rule furthers ERISA's goal of protecting plan participants and beneficiaries.

Second, ERISA's savings clause does not allow the preemption of "State law" that "regulates insurance." *See* 29 U.S.C. § 1144(b)(2)(A). As a *decisional* law, the contra insurer rule is a "State law" under ERISA, *id.* § 1144(c)(1), as used in both the preemption and savings clauses. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91-92 & n.6 (1983). As discussed *infra*, the contra insurer rule clearly "regulates insurance" under ERISA's savings clause and thus is not preempted. *See Met. Life v. Massachusetts*, 471 U.S. at 732.

Contrary to the Eighth Circuit's decision, the Ninth Circuit held that ERISA incorporates the state contra insurer rule. *See Kunin*, 910 F.2d at 540 (alternative holding). *See also id.* at 539 n.8 (discussing confusion of various courts on interpretation of ERISA's savings clause). In *Metropolitan Life Ins. Co. v. Massachusetts*, this Court quoted with approval an earlier case that stated that the "interpretation" of an insurance policy is at "'the core of the *business of insurance*.'" 471 U.S. at 744 (emphasis added) (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969)). If *interpreting* the terms of an insurance policy is *at the core of the business of insurance*, then state rules of construction that dictate how to interpret an insurance policy must likewise be laws that "regulate insurance." Therefore, the states' contra insurer rule is not preempted under ERISA.

Petitioner contends that the Ninth Circuit correctly incorporated the state contra insurer rule into ERISA to assist in construing a group health insurance policy and correctly concluded that autism is not a "mental illness" under the applicable policy. *See Kunin*, 910 F.2d at 538. The Ninth Circuit accepted the same conclusion drawn by the district court in this case that "mental illness 'refers to a behavioral disturbance with no demonstrable organic or physical basis... [and] stems from reaction to environmental conditions as distinguished from organic causes.'" *Id.* (quoting decision below, 696 F. Supp. at 1346). *See* App. B at A-19, 730 F. Supp. at 297. In contrast, the Eighth Circuit concluded both that ERISA preempts the contra insurer rule and that "mental illness" should be construed broadly based on its manifested symptoms, rather than narrowly based on its cause. App. A at A-7, 921 F.2d at 154. *But see Arkansas Blue Cross & Blue Shield, Inc. v. Doe*, 22 Ark. App. 89, 93-94, 733 S.W.2d 429, 432 (1987) (en banc) (bipolar affective mood disorder is a physical, organically based disorder that is properly classified by cause, not symptoms and therefore is not a "mental illness" under health insurance policy

limitations). *Cf. Equitable Life Assur. Soc. v. Berry*, 212 Cal. App.3d 832, 837-41, 260 Cal. Rptr. 819, 822-24 (6th Dist. 1989) (recognizing that ambiguities in policy are construed against the insurer, but finding that specific policy language at issue, "mental disorder," was *unambiguous* and properly classified by symptoms rather than cause). *But Cf. Rosenthal v. Mutual Life Ins. Co.*, 732 F. Supp. 108, 110-11 (S.D. Fla. 1990) ("mental disorder" is *ambiguous* and "reasonable persons could find that Bipolar Affective Disorder is a physical illness which manifests itself through mental symptoms" and thus "mental disorder" is not limited by policy limitations clause).

Given the importance of this issue, this Court should resolve the conflict in the circuits by granting a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

B. Even If The Contra Insurer Rule Were Preempted By ERISA, The Conflict Among The Circuits Requires Resolution By This Court Of Whether The Federal Common Law of ERISA Incorporates The Contra Insurer Rule That Ambiguous Insurance Policy Terms Are Construed In Favor Of The Insured And Against The Insurer.

Even if ERISA preempts state laws mandating application of the contra insurer rule, a conflict in the circuits still exists. The Ninth Circuit decision in *Kunin* incorporated the rule into the federal common law of ERISA, 910 F.2d at 540, a decision which again conflicts directly with the Eighth Circuit's rejection of the rule. App. A at A-6 to A-7, 921 F.2d at 154. The Eighth Circuit's refusal to incorporate the contra insurer rule into the federal common law of ERISA conflicts with *Kunin* and the spirit and purpose of ERISA, as well. As previously noted, all fifty states and the District of Columbia employ the contra insurer rule. Even federal

admiralty law employs the contra insurer rule. *See Employers Ins. of Wausau v. Trotter Towing Corp.*, 834 F.2d 1206, 1210 (5th Cir. 1988). The uniformity that Congress sought to ensure with ERISA's preemption provision is destroyed by the Eighth Circuit decision in this case -- a decision which conflicts not only with the Ninth Circuit, but also conflicts with the interpretation of every state in the country as well. *See Kunin*, 910 F.2d at 538-39 & n.6, 540.

Moreover, in principle the Eighth Circuit decision conflicts with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110-115. In support of its decision, the Eighth Circuit cited this Court's admonition in *Bruch* not to defer to either party's interpretation. App. A at A-5 to A-6, 921 F.2d at 153-54. Misconstruing that language in *Bruch*, the court of appeals held that ERISA not only preempted the contra insurer rule, but also required an opposite result -- construction of an ambiguous policy term in favor of the *insurer*! App. A at A-7, 921 F.2d at 154. This portion of the Eighth Circuit decision conflicts with the result in *Bruch* by lessening the protections of insured beneficiaries from that which they formerly had under the common law contra insurer rule. *See Bruch*, 489 U.S. at 113-14.

In *Bruch* this Court refused to adopt a reading of ERISA that "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* Likewise, the Eighth Circuit should have been unwilling to reject a rule of construction that effectively diminished the protection afforded plan participants and beneficiaries from that which they enjoyed before passage of ERISA. The Ninth Circuit first contemplated the applicability of the contra insurer rule to ERISA and thought "it would take a certain degree of arrogance to controvert an opinion held with such unanimity in the various states and to adopt a contrary view

as the federal rule." *Kunin*, 910 F.2d at 540. Nevertheless, the Eighth Circuit expressly rejected the axiomatic and uniformly held view that ambiguous insurance policies drafted by the insurer are construed against the insurer and in favor of the insured.

The Eighth Circuit also rejected the contra insurer rule because it could be characterized as a rule of *contract* and not just *insurance* law. App. A at A-5, 921 F.2d at 153. The Eighth Circuit's decision ignores the fact that ERISA regulates a specific kind of *contract*; as this Court recognized in *Bruch*, courts construe ERISA plans as they do "*contractual* provisions" and "terms in trust *agreements*." *Bruch*, 489 U.S. at 112 (emphasis added). Furthermore, this Court also acknowledged that ERISA was enacted to promote the interests of employees and beneficiaries and "'to protect *contractually defined benefits.*'" 489 U.S. at 113 (emphasis added) (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). Applying a specialized rule of *contract construction* to insurance *contracts* therefore makes eminent sense and, significantly, *was the common law rule prior to passage of ERISA*.

If the contra insurer rule was preempted under ERISA, petitioners respectfully submit that the purpose of ERISA and this Court's prior precedents support the conflicting Ninth Circuit opinion in *Kunin* and mandate that the contra insurer rule be incorporated into the federal common law of ERISA.

CONCLUSION

For the foregoing reasons petitioners respectfully request that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated this 1st day of May, 1991.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 90-1226EM, 90-1227EM

Robert P. Brewer, Natural Guardian
and Duly Appointed Next Friend of
Robert C. Brewer,
Appellee,

v.

Lincoln National Life Insurance Company,
Appellant.

Submitted Oct. 8, 1990

Decided Dec. 7, 1990

Clark Cole, St. Louis, Mo., for appellant.

Joseph F. Devereux, Jr., St. Louis, Mo., for appellee.

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, nior Circuit Judge, and WOLLMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Robert P. Brewer appeals the district court's termination that the care administered his son, Robert C. ewer, was "psychiatric care" and its refusal to award orney fees in his favor. Lincoln National Life Insurance mpany (hereinafter "Lincoln National") also appeals, llenging both the district court's determination that Robert Brewer was not hospitalized due to a "mental illness" and refusal to admit into evidence material contained in coln National's "Post-Trial Appendix." We reverse the

district court's conclusion that the son's affliction was not a "mental illness" and, consequently, obviate the need to address the other issues presented in this appeal.

I. BACKGROUND

Robert P. Brewer participated in an employee welfare benefit plan provided by his employer, Missouri Encom, Inc. Health benefits under the plan were provided by Lincoln National.

Robert P. Brewer's son, Robert C. Brewer, was hospitalized on three occasions between October 1986 and October 1987. The hospitalization was prompted by a sharp decline in the son's grades, repeated incidents of lying, and other behavioral problems both in and out of school. T.Tr. 16–18. Brewer's son was diagnosed as suffering from affective mood disorder, and he was successfully treated with a combination of drugs and psychotherapy.

One insurance policy was in effect during the first two visits, and a second policy was in effect during the last visit. The first policy limited its coverage for hospital charges associated with "mental illness(es), functional nervous disorder(s)... or for psychiatric or psychoanalytic care" to a maximum of $50,000. The second policy had the same limit for charges associated with care of "mental illness(es)." Neither policy defined the phrase "mental illness." The first policy defined "illness" as "a bodily disorder or disease, pregnancy, mental infirmity or bodily injury," and the second policy contained a similar definition.

Claims were submitted to Lincoln National, which paid for the care in accordance with the policies' provisions regarding mental illnesses. A total of $55,912.87 was unpaid by Lincoln National; $31,240.38 due to the cap in the first policy and $24,672.49 due to the cap in the second policy.

It is undisputed that these charges would have been paid if the limitations on coverage did not apply.

At trial, the district court heard testimony from three doctors of varying specialties. The testimony indicated that the precise cause of the son's condition was unknown, but that mounting medical evidence suggested that affective mood disorder is genetically or biologically caused. T.Tr. at 47, 88–89. Based on the testimony, the district court concluded that the son did not suffer from a mental illness because a "'mental illness stems from reaction to environmental conditions as distinguished from organic causes'" and that "'mental illness is often thought by lay persons as having nonphysical, psychological causes, in the Freudian sense, as opposed to an organic basis.'" *Brewer v. Lincoln Nat'l Life Ins. Co.*, 730 F. Supp. 292, 297 (E.D. Mo. 1989) (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp. 1342, 1346, 1347 (C.D. Cal. 1988), *aff'd*, 910 F.2d 534 (9th Cir. 1990)). The district court also determined that the treatment was psychiatric care because it was "'the sort of treatment, such as electroshock therapy and psychotropic medication, rendered to a patient who has been admitted to a psychiatric ward in order to attend to his or her psychiatric disorder.'" *Id.* (quoting *Simons v. Blue Cross & Blue Shield of Greater New York*, 144 A.D.2d 28, 33, 536 N.Y.S.2d 431, 434 (1989)). Consequently, the court ruled that Lincoln National properly denied coverage under the first policy because coverage was limited as to "psychiatric care" but that coverage was improperly denied under the second policy because there was no cap on psychiatric care and the son did not suffer from a mental illness.

II. DISCUSSION

Initially, we must determine whether the district court properly utilized Missouri's rule construction requiring that ambiguities in insurance contracts be resolved in favor of the

insured (the "contra insurer rule").[1] While it is true that state law can be used as a guide for fashioning the federal common law applicable to ERISA, *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir. 1989), state law cannot be used if it is contrary to the provisions of ERISA. *Rockney v. Blohorn*, 877 F.2d 637, 643–44 (8th Cir. 1989). We conclude that this state law rule of construction violates the provisions of ERISA and thus cannot be used to interpret the plan's terms.

ERISA is a broad, comprehensive regulation that preempts state laws relating to employee benefit plans, 29 U.S.C. § 1144(a), unless the state law in question "regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A). The preemption clause applies broadly to all state laws that have any direct or indirect relation to pension plans even if they were not designed specifically for that purpose. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–98, 103 S.Ct. 2890, 2899–2901, 77 L.Ed.2d 490 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525, 101 S.Ct. 1895, 1907, 68

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[1]While the district court did state that it would "review the terms of the plans without giving deference to either side's position," *Brewer*, 730 F. Supp. at 296, the court also determined that state law could be used as a guide in interpreting the policies. To that end, the court referred to Missouri cases holding that "[p]rovisions restricting coverage are construed in favor of the insured and against the insurer," *id.* (citing *Citizens Ins. Co. of N.J. v. Kansas City Commercial Cartage, Inc.*, 611 S.W.2d 302, 307 (Mo.Ct.App.1980) (per curiam)), and that ambiguities should be "resolved in favor of the insured." *Id.* at 296–97 (citing *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. 1982) (en banc)). We cannot tell whether or to what extent the contra insurer rule affected the district court's opinion, and are compelled to address the issue because of this uncertainty.

L.Ed.2d 402 (1981). However, a state law is not preempted if it regulates insurance; that is, if it "has the effect of transferring or spreading a policyholder's risk, ... is an integral part of the policy relationship between the insurer and the insured, and ... the practice is limited to entities within the insurance industry.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49, 107 S.Ct. 1549, 1553-54, 95 L.Ed.2d 39 (1987) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982)).

Missouri's rule of construction clearly affects pension plans. However, it does not regulate the insurance industry. We agree with the Sixth Circuit that the contra insurer rule is a "general principle of contract construction [that] does not effect a spreading or transferring of policyholders' insurance risk, but rather forces the insurer to bear the legal risks associated with ambiguous policy language." *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 429 (6th Cir. 1989). Furthermore, this rule of construction is nothing more than a specific application of general state contract principles and was not specifically designed for the insurance industry. *E.g., Shelter Mut. Ins. Co. v. Haller*, 793 S.W.2d 391, 393 (Mo.Ct.App. 1990); *Farm Bureau Mut. Ins. Co. v. Broadie*, 558 S.W.2d 751, 755 (Mo.Ct.App. 1977); *see also McMahan*, 888 F.2d at 429 (discussing Kentucky law). Consequently, the contra insurer rule does not regulate insurance and is preempted by ERISA.

Our conclusion is further supported by the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). There, the Supreme Court injected principles of trust law into ERISA and decided that a denial of benefits was to be reviewed de novo unless the plan specifically granted the plan administrator discretion to determine eligibility. *Id.* at 114, 109 S.Ct. at 956. We have previously interpreted *Bruch* to mean that "unless the plan language specifies otherwise,

courts should construe any disputed language 'without deferring to *either* party's interpretation.'" *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1329 (8th Cir. 1989) (quoting *Bruch*, 489 U.S. at 112, 109 S.Ct. at 955) (emphasis added).[2]

Having determined that neither party's construction should be favored, we still must decide how the phrase "mental illness" is defined. ERISA does not provide an express answer, so we must "ascertain the proper federal common law principles that should govern." *Lyman Lumber*, 877 F.2d at 693. And, while "fashioning a body of federal common law, we may look to state law for guidance." *Id.*, as noted above, state law is an inappropriate guide in this situation. Consequently, we look elsewhere, first at ERISA itself.

Lincoln National was required to furnish plan descriptions "written in a manner calculated to be understood by the average plan participant...." 29 U.S.C. § 1022(a)(1). It would be improper and unfair to allow experts to define terms that were specifically written for and targeted toward laypersons. This requirement provides a source from which we may fashion a federal common law rule; the terms should be accorded their ordinary, and not specialized, meanings.

The cause of a disease is a judgment for experts, while laymen know and understand symptoms. Laymen undoubtedly are aware that some mental illnesses are organically caused while others are not; however, they do not classify illnesses based on their origins. Instead, laypersons

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[2]The Ninth Circuit recently addressed both this argument and the preemption argument and reached results contrary to those we reach today. *See Kunin*, 910 F.2d at 538-41. We expressly disagree with our sister court's conclusions and decline to follow *Kunin*.

are inclined to focus on the symptoms of an illness; illnesses whose primary symptoms are depression, mood swings and unusual behavior are commonly characterized as mental illnesses regardless of their cause.

Neither policy in this case limited the definition of "mental illness" to only those illnesses that have a non-organic origin, and the district court should not have adopted a definition that effectively imposed such a limitation. By focusing upon the disease's etiology, the district court considered factors that are important to experts but not to laypersons. The court thus failed to examine the term "mental illness" as a layperson would have, which is the examination we conclude ERISA and federal common law require.

III. CONCLUSION

Robert C. Brewer's disease manifested itself in terms of mood swings and aberrant behavior. Regardless of the cause of his disorder, it is abundantly clear that he suffered from what laypersons would consider to be a "mental illness." Consequently, Lincoln National properly limited its coverage under both policies.[3] For these reasons, the district court's order is affirmed as to the first policy and reversed as to the second.

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[3]Because both policies limited coverage for mental illnesses, we do not need to decide whether the district court properly characterized the treatment as "psychiatric care." There is also no need to review either the exclusion of Lincoln National's "Post-Trial Appendix" or the denial of Brewer's attorney fees.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-1987C(3)

ROBERT P. BREWER, Natural Guardian and
Duly Appointed Next Friend of
ROBERT C. BREWER,
Plaintiffs,

v.

Lincoln National Life Insurance Company,
Defendant.

MEMORANDUM

This matter is before the Court to determine the merits of plaintiffs' claims after a one day bench trial.

Pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., plaintiffs seek equitable relief,[1] $55,912.87 in damages, interest, attorney's

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[1]Pursuant to 29 U.S.C. § 1132(3), plaintiffs seek declarations

> that affective mood disorder is a physical ailment for which defendant is obligated to pay benefits in accordance with its policy[;] . . . that the refusal of defendant to pay medical expenses incurred by plaintiff[s] for treatment of affective mood disorder

fees, and costs for defendant's allegedly improper failure to pay benefits under health insurance policies issued by defendant pursuant to an employee health plan provided by plaintiff Robert P. Brewer's employer. Defendant asserts that it is not liable for the payment of any additional expenses incurred during the relevant hospitalizations. In particular, the parties dispute whether charges for in-hospital care of severe affective mood disorder fall under the broad major medical benefits provision of the policies.

Having fully considered the pleadings, depositions, stipulations, evidence, and the entire record herein, the Court makes and enters the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Robert P. Brewer ("Robert Brewer") at all times material herein was a citizen of the State of Missouri and the County of St. Louis. Robert Brewer is the father, natural guardian, and duly appointed next friend of plaintiff

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> was a breach of fiduciary duty, unlawful and vexatious[;] . . . [and] that by the terms of the policy of insurance and pursuant to 29 U.S.C. § 1132, plaintiff[s are] entitled to coverage under said policy in the amount of $1,000,000 for any medical expenses arising in connection with any treatment rendered to plaintiff [Robert C. Brewer] for affective mood disorder.

Plaintiffs also seek an order permanently enjoining defendant "from denying plaintiff[s'] claim for benefits arising in connection with any treatment rendered to plaintiff [Robert C. Brewer] for affective mood disorder."

Robert C. Brewer ("Rob Brewer"), a minor and a dependent of Robert Brewer.

2. Defendant Lincoln National Life Insurance Company ("Lincoln") at all times material herein was a corporation duly existing under and by virtue of the laws of the State of Indiana, with its principal place of business in the State of Indiana, and is authorized to conduct business in the State of Missouri.

3. At all relevant times, plaintiffs were covered by an insurance plan provided by Robert Brewer's employer under which group health insurance policies were issued and administered by defendant Lincoln. In January 1988, defendant Lincoln stopped providing health insurance for Robert Brewer's employer.

4. The relevant insurance policies provide liberal benefits for charges by a hospital for board and room, medical services and supplies, and fees of legally qualified physicians and surgeons for medical care or treatment ("major medical expense provisions"). The policies also provide only limited coverage for charges for treatment of mental illness and of functional nervous disorders or nervous conditions of any type or cause ("mental illness provisions"). The first insurance policy also provides that charges for "psychiatric or psychoanalytic care for any reason" are encompassed by the mental illness provision.

5. The parties stipulated that the disputed charges would fall within and be fully paid under the major medical expense provisions of the policies were it not for the limitations of the mental illness provisions.

6. The mental illness provision in the first relevant insurance policy states:

> *Mental Illness, Substance Abuse and Alcoholism*
> Charges for treatment of mental illness(es), functional nervous disorder(s) of any type or cause, substance abuse, alcoholism, or for psychiatric or psychoanalytic care for any reason are covered as follows:
>
> 1. hospital charges for a maximum of 40 days of confinement in any one calendar year, and
>
> 2. charges by a legally qualified physician to a maximum payment of $30 per visit, limited to a maximum payment of $3,000 in any one calendar year.
>
> (The word "VISIT" includes each attendance of the physician to the patient, regardless of the type of professional services rendered, whether it might be otherwise termed consultation, treatment, or described in some other manner.)

That policy also provides that there is a "$50,000 maximum with respect to charges in connection with mental illness and substance abuse." The only definition in this policy states that:

> "Illness" or "Sickness" means a bodily disorder or disease, pregnancy, mental infirmity or bodily injury.

Otherwise, this policy does not contain a specific definition of "mental illness" or of "psychiatric care." Nor does this policy incorporate or adopt any other references to define those terms.

7. The mental illness provisions in the second relevant insurance policy provide as follows:

MAJOR MEDICAL LIMITATIONS

The maximum payment for care of mental illness, nervous conditions of any type or cause, substance abuse or outpatient treatment of alcoholism, by a doctor will not be more than $30.00 for each visit with a maximum of $3,000 in any one calendar year.

(A "Visit" occurs each time the doctor provides care to the patient.)

Maximum Covered Charge for Room and Board

* * *

For treatment of mental illness or substance abuse, charges are limited to a maximum of 40 days of hospital confinement in any one calendar year.

The policy also states that there is a $50,000 maximum (lifetime aggregate) benefit "for charges for mental illness(es), substance abuse or outpatient treatment of alcoholism."

This policy, unlike the earlier policy, contains a section on definitions. This section defines "illness" as "1. A disorder or disease of the body or mind; or 2. An accidental bodily injury; or 3. Pregnancy." This section does not contain a definition for "mental illness" or for "nervous conditions of any type or cause." Nor does this policy incorporate or adopt any other references to define those terms.

8. Rob Brewer was hospitalized on three separate occasions. The first hospitalization took place on October 6, 1986, and lasted until December 22, 1986. The second hospitalization began on January 28, 1987, and lasted until

April 4, 1987. The third hospitalization began on August 1, 1987, and lasted until October 9, 1987.

9. During each hospitalization, Rob Brewer was treated based upon diagnoses of severe affective mood disorder. His primary physician during these hospitalizations was Felix LaRocca, M.D., a psychiatrist who is board certified in psychiatry and child psychiatry. The care included the administration and monitoring of prescription medications (lithium bicarbonate and Nardil) along with psychotherapy sessions and meetings with the family.

10. The charges for these hospitalizations were paid in full to the extent permitted by the mental illness provisions of the insurance policies. The parties agree that the hospital and doctor bills for Rob Brewer's treatment during the hospitalizations at issue here are reasonable and that the treatment rendered was reasonably necessary to treat Rob Brewer's condition.

11. The charges not paid by defendant total $55,912.87, with $31,240.38 of that amount falling within the provisions of the first insurance policy, and $24,672.49 of that amount falling within the provisions of the second insurance policy. The disputed charges are for Dr. LaRocca's services, the psychiatric unit at the hospital, medications administered by Dr. LaRocca, and the psychologist's services.

12. Dr. LaRocca described Rob Brewer's diagnosed disorder as a hereditary disease characterized by a disturbance of catecholamines in the brain which produces a symptom of depression in some cases such as this one. While Dr. LaRocca characterized the etiology of this disorder as "uncertain," he stated it was possibly a derangement of neurotransmitters in the brain.

13. Dr. LaRocca reported the treatment for such a disorder is primarily medication and secondary

psychotherapy. This was the treatment provided to Rob Brewer and is considered by Dr. LaRocca to be "psychiatric treatment."

14. Dr. LaRocca consistently espouses the position that insurance companies should not differentiate in coverage between certain psychiatric care expenses and other major medical expenses. Although he had not read the language of the insurance policies at issue here, Dr. LaRocca opined that "affective mood disorder is not a mental illness or functional nervous disorder within the meaning of the exclusion set forth in the [relevant] group insurance plan." While these matters detract from the weight to be given Dr. LaRocca's testimony with respect to whether or not the charges at issue here are covered by the relevant insurance policies, they do not detract from the weight to be accorded his expert testimony regarding the basis of the disease and the treatment given to Rob Brewer.

15. Duane Hagen, M.D., a psychiatrist who is board certified in psychiatry, acknowledged that the precise etiology for mood disorders, such as those Rob Brewer had, is unknown but is increasingly being shown as having a biological or genetic basis. These mood disorders encompass severe mood changes where the person is unable to think or concentrate, has thoughts of suicide, and has negative thoughts. Treatment of severe mood disorders includes the use of antidepressant and other mood-stabilizing medications, as well as electro-convulsive therapy, if deemed appropriate.

16. To Dr. Hagen, the phrase "mental illness" encompasses any kind of emotional upset or distress including disorders.

17. Upon analysis of the available records, and without examining Rob Brewer personally, Dr. Hagen opined that Rob Brewer had a primarily depressive or unipolar mood disorder that was treated properly and reasonably. To Dr.

Hagen, the treatment provided to Rob Brewer was "psychiatric treatment" which has as its essence the proper diagnosis and use of medications along with adjunctive counselling.

18. Thomas Harris, M.D., a psychiatrist who is board certified in psychiatry, described affective mood disorders as having symptoms which affect a person's behavior, mood, and thinking processes, and as having, in some instances, an origin in inherited biological abnormalities. Dr. Harris included bipolar disorders, schizo-affective disorders, and major severe depressive disorders as in the latter group. Based on the available records and without personally examining Rob Brewer, Dr. Harris opined that Rob Brewer had a severe mood disorder which was an inherited vulnerability that caused problems through "abnormalities in brain and body chemistry and physiology, and which [has] secondary psychological and behavioral symptoms." Thus, Dr. Harris concluded Rob Brewer had a biological, rather than a mental, illness, although he did not clearly define "mental illness."

19. Dr. Harris distinguished the treatment for these illnesses as follows:

> The primary type of treatment that works for mental disorders is... some form of relearning experience.
>
> For biological disorders, it's important to stabilize the biological abnormality and this requires, generally, biological treatment.

Here, Dr. Harris noted, the primary course of treatment was the use of medications to stabilize Rob Brewer's "abnormal mood state and his marked and severe mood changes." Then, Dr. Harris acknowledged, psychotherapy group interaction, family involvement, and psychosocial therapies were used to assist the effectiveness of the medicinal treatment. For Dr.

Harris, the professional change in treatment methods, from primarily psychotherapeutic to primarily biological (such as medicines and electroconvulsive therapy) interventions reflects the presently accepted concept that these disorders have a biological basis, despite the fact the precise origin is not yet known. Dr. Harris further noted that counselling is provided to patients with diabetes and other chronic illnesses.

20. There is no evidence of record that Rob Brewer's disorder stemmed from a traumatic experience or from a parental relationship.

21. Thus, the available expert testimony establishes there is a biological basis for the disorder affecting Rob Brewer, even though the exact etiology of the disorder is not yet known.

22. On November 24, 1987, defendant denied plaintiffs' request for coverage of the expenses incurred during the third hospitalization.

Conclusions of Law

A. This Court has jurisdiction over the parties and subject matter of this action pursuant to 28 U.S.C. § 1332 and 29 U.S.C. § 1132(f).

B. Venue before this Court is appropriate pursuant to 29 U.S.C. § 1132(e)(2).

C. The insurance policies at issue here are "employee welfare benefit plans" pursuant to 29 U.S.C. § 1002(1)(A).

D. Plaintiffs are participant in and beneficiaries of the plans at issue here. 29 U.S.C. § 1002(7) and § 1002(8).

E. In relevant part, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., provides

that "[a] civil action may be brought... by a [plan] participant or beneficiary... to recover benefits due... under the terms of [the] plan, to enforce... rights under the terms of the plan, or to clarify... rights to future benefits under the terms of the plan[.]" 29 U.S.C. § 1132(a)(1)(B). In such actions, actions like this one, "a denial of benefits... is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co v. Bruch*, 109 S. Ct. 948, 956 (1989). Under this standard, the Court construes the terms of the plan "without deferring to either party's interpretation." *Id.* at 955.

Here, there is no contention that the relevant plan gives defendant discretionary authority to determine eligibility for benefits or to construe the terms of the plans. Accordingly, the Court will review the terms of the plans without giving deference to either side's position.

F. Where, as here, none of ERISA's provisions addresses the issues presented in the case, state law may be used for guidance in ascertaining the principles applicable to the ERISA action. *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir. 1989) (court may look to state law to fashion federal common law principles applicable to an ERISA case); *Rockney v. Blohorn*, 877 F.2d 637, 643-44 (8th Cir. 1989) (court may look to appropriate state contract law to govern the interpretation and enforcement of employer benefit plans so long as application of that law would not be contrary to ERISA's provisions).

G. Here, there is no dispute that the contested charges would be covered by and fully paid under the major medical expense provisions of the relevant policies if the limitations of the policies' mental illness provisions did not exist. Thus, the issue is whether or not the policies' mental illness provisions apply to the disputed charges. Provisions

restricting coverage are construed in favor of the insured and against the insurer, who has the burden of clearly and unambiguously expressing its intent to exclude. *Citizens Ins. Co. v. Kansas City Commercial Cartage, Inc.*, 611 S.W.2d 302, 307 (Mo. App. 1980) (per curiam). Plain and unambiguous language in an insurance contract must be given its plain meaning. *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 623 (8th Cir. 1981) (applying Missouri law). Any ambiguity is resolved in favor of the insured. *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. 1982) (en banc). Policy language is ambiguous if it is reasonably open to different construction. *Id.* Finally, the policy language must be viewed in light of the meaning understood by the lay person who obtained the policy. *Id.*

H. Upon consideration of the mental illness exclusionary language in the policy applicable to the first two hospitalizations, the Court is persuaded that the disputed charges (totalling $31,240.38) fall within the exclusion as "[c]harges for... psychiatric... care for any reason." Whether the Court relies on the credible expert testimony, which characterized the care given to Rob Brewer as "psychiatric care," or looks for the plain and ordinary meaning of that phrase, the result is the same. In *Simons v. Blue Cross & Blue Shield*, 144 A.D.2d 28, 536 N.Y.S.2d 431 (1989), the New York Supreme Court, Appellate Division, found that "[t]he plain, ordinary meaning of 'psychiatric' care is the sort of treatment, such as electroshock therapy and psychotropic medication, rendered to a patient who has been admitted to a psychiatric ward in order to attend to his or her psychiatric disorder." *Id.* at 434. This Court concurs with that New York court's assessment of "psychiatric care."

Accordingly, the Court finds defendant properly denied payment of $31,240.38 in charges incurred for the first two hospitalizations at issue here.

I. The "psychiatric care" language is not in the second policy which covered the third hospitalization. With respect to the disputed charges (totalling $24,672.49) incurred during the third hospitalization, defendant relies on the policy language which excludes "[c]harges for treatment of mental illness(es)."

J. The relevant definition in the policy, the definition of illness, only serves to render more ambiguous the phrase "mental illness" since the definition itself encompasses "mental infirmity." Thus, in and of itself, the insurance policy does not shed light on the interpretation of this phrase.

K. The record does not provide an expert's definition of the phrase "mental illness." Indeed, one expert opined the phrase encompasses any type of emotional distress. Such a description does not serve to clarify the phrase.

L. Moreover, the Court deems it appropriate to ascertain the ordinary meaning a lay person would give to the phrase. *Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp. 1342, 1345 (C.D. Calif. 1988).

M. Having carefully considered the matter, the Court adopts the definition derived by the court in *Kunin, supra*. In that case, the court decided that an insurer's inclusion of "autism" within the limitation clause covering "mental illness" was not a reasonable interpretation of the policy and plan. *Id.* at 1347. In coming to this conclusion, the court adopted a definition of "mental illness" as an illness that "refers to a behavioral disturbance with no demonstrable organic or physical basis.... [A] mental illness stems from reaction to environmental conditions as distinguished from organic causes." *Id.* at 1346, 1346-47. The evidence in *Kunin* established that autism is one of the "pervasive developmental disorders... defined by its symptoms" and having an unknown etiology, with "medical research [showing] increasingly strong

evidence of a demonstrable organic basis for the syndrome." *Id.* at 1343, 1344. Noting that

> [if] the general nature of the cause of an illness is known and the cause is organic, the illness should not be encompassed within the term "mental illness" merely because of a lack of precision in the understanding of its causation[.]... [The court found that] mental illness is often thought of by lay persons as having nonphysical, psychological causes, in the Freudian sense, as opposed to an organic basis. Where dysfunctions of the brain derive from an identifiable organic basis, as in the case of brain cancer or Alzheimer's disease, the condition would not commonly be understood as mental illness. A related factor which can distinguish mental illnesses is their causation by environmental factors, such as traumatic experiences or childhood relationships.

Id. at 1346, 1347.

N. This Court finds the *Kunin* court's reasoning persuasive and, based upon that reasoning, determines the severe disorder at issue here is not a "mental illness" within the meaning of the second policy issued by defendant. Here, the evidence credibly establishes that the severe disorder affecting Rob Brewer stemmed most probably from a chemical imbalance in his brain, rather than from environmental factors such as a traumatic experience or a parental relationship. While the disorder is described through its symptoms, that in and of itself does not render it a "mental illness" as defined by this Court. Additionally, Rob Brewer was successfully treated with a regimen focused mainly on prescription medications. The secondary use of counselling to assist with Rob Brewer's adaptation to and recovery from the disorder does not take the malady within the realm of "mental illness." As Dr. Harris noted, counselling is used

regularly to assist patients with diabetes and other chronic diseases.

0. Accordingly, the Court finds it was improper for defendant to deny coverage of the expenses incurred during Rob Brewer's third hospitalization. Thus, the Court will award judgment in favor of plaintiffs and against defendant in the total amount of $24,672.49 for improperly denied benefits, plus post-judgment interest at the statutory rate.

P. The parties' requests for attorneys' fees and costs will be taken up by separate order.

Q. Defendant no longer being the health insurance carrier for the plan provided by Robert Brewer's employer, and finding no evidence to support the additional relief requested, the Court will deny plaintiffs' other requests for relief.

Dated this 6th day of October, 1989.

/s/William L. Hungate
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-1987C(3)

Robert P. Brewer, Natural Guardian and
Duly Appointed Next Friend of
Robert C. Brewer,
Plaintiffs,

v.

Lincoln National Life Insurance Company,
Defendant.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs Robert P. Brewer and Robert C. Brewer recover from defendant Lincoln National Life Insurance Company a total of $24,672.49 in principal and postjudgment interest at the statutory rate, plus attorney's fees and costs to be decided during the course of subsequent proceedings.

Dated this 6th day of October, 1989.

/s/William L. Hungate
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-1987C(3)

Robert P. Brewer, Natural Guardian and
Duly Appointed Next Friend of
Robert C. Brewer,
Plaintiffs,

v.

Lincoln National Life Insurance Company,
Defendant.

ORDER

This matter is before the Court on plaintiff's motion to strike defendant's post-trial appendix. Defendant opposes the motion and alternatively asks the Court to take judicial notice of the materials contained in the disputed appendix.

Upon careful consideration,

IT IS HEREBY ORDERED that plaintiffs' motion to strike is granted.

IT IS HEREBY FURTHER ORDERED that defendant's alternative request to take judicial notice is granted in part as to Mo. Rev. Stat. §§ 376.381 and 376.382; and is otherwise denied.

Dated this 6th day of October, 1989.

/s/William L. Hungate
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-1987C(3)

Robert P. Brewer,
Plaintiff,

v.

Lincoln National Life Insurance Company,
Defendant.

ORDER

This matter is before the Court on plaintiff's motion to alter or amend this Court's judgment by granting prejudgment interest. Defendant concurs that plaintiff is entitled to prejudgment interest and states "the judgment should be amended as proposed by plaintiff."

Upon consideration,

IT IS HEREBY ORDERED that plaintiff's motion is granted and the judgment dated October 6, 1989, is altered only so as to change the total amount to $28,691.70 (principal and prejudgment interest) as suggested by plaintiff. In all other respects, the judgment remains in full force and effect.

Plaintiff's request for attorney's fees and expenses remains before the Court.

/s/William L. Hungate
UNITED STATES DISTRICT JUDGE

Dated: 11/20/89

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-1987C(3)

Robert P. Brewer, et al.,
Plaintiffs,

v.

Lincoln National Life Insurance Company,
Defendant.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiffs' request for an award of attorneys' fees is denied.

IT IS HEREBY FURTHER ORDERED that plaintiffs' request for an award of costs is granted in part and denied in part so that a total of $1,929.61 in costs is taxed in favor of plaintiffs.

/s/William L. Hungate
UNITED STATES DISTRICT JUDGE

Dated: 2/15/90

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-1684

In The

Supreme Court of the United States

October Term, 1990

ROBERT P. BREWER, Natural Guardian and Duly-Appointed Next Friend of ROBERT C. BREWER,

Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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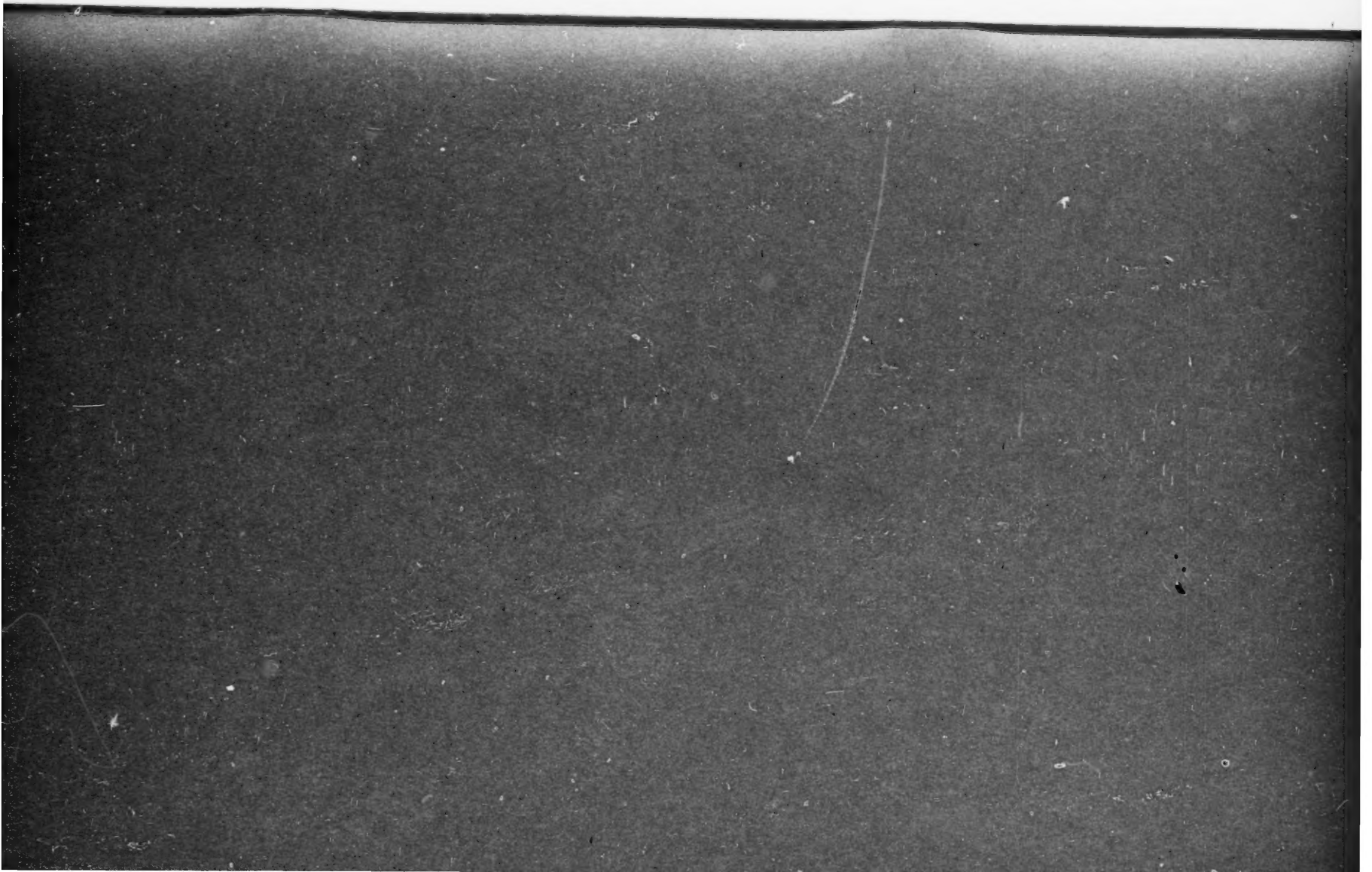

QUESTIONS PRESENTED

I.

Whether the Eighth Circuit properly declined to apply the contra insurer rule where it concluded that it was abundantly clear that Petitioner's son suffered from what laypersons would consider to be a "mental illness," giving that term its ordinary meaning.

II.

Whether the Eighth Circuit, in the case before it, properly declined to announce that the federal common law of ERISA adopts or incorporates the contra insurer rule, where it concluded that it was abundantly clear that Petitioner's son suffered from what laypersons would consider to be a "mental illness," giving that term its ordinary meaning.

STATEMENT PURSUANT TO RULE 29.1

The parent of Respondent The Lincoln National Life Insurance Company is Lincoln National Corporation. The Lincoln National Life Insurance Company has no subsidiaries other than wholly-owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner Robert P. Brewer was a participant in an employee welfare benefit plan, which provided health care benefits through a group policy of insurance issued by Respondent Lincoln National Life Insurance Company ("Lincoln National"). Petitioner's son, Robert C. Brewer ("Rob") was hospitalized under a psychiatrist's care on three occasions for treatment of "severe affective mood disorder." The hospitalizations were prompted by Rob's exhibiting signs of depression and destructive and self-destructive behavior. He had thoughts of suicide, reported hearing "voices" and was a disciplinary problem at school and home. He was treated with a combination of psychotherapy and prescription medication, lithium carbonate and Nardil. Pet.App. A-12, A-13, 730 F.Supp. at 294; Pet.App. A-2, 921 F.2d at 152. Lincoln National paid benefits in accordance with its policy provisions for treatment of mental illness. Petitioner claims Rob's illness had an organic basis and that the "mental illness" limitation is therefore inapplicable. Suit was originally filed as an action on an insurance contract, but Petitioner amended to claim entitlement to benefits and other relief under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132.

One Lincoln National policy was in effect during Rob's first two hospitalizations, and a second policy was in effect during the third hospitalization. The first policy limited reimbursable charges "for treatment of mental illness(es), functional nervous disorder(s) of any type or cause, substance abuse, alcoholism, or for psychiatric or psychoanalytic care for any reason." The second policy did not use the terms "psychiatric or psychoanalytic

care" but limited payment for care or treatment of "mental illness." Pet.App. A-11, A-12, 730 F.Supp. at 294; Pet.App. A-2, 921 F.2d at 152.[1] Lincoln National paid for Rob's hospitalizations and the care of the psychiatrist, Dr. Larocca, in accordance with its policy provisions for treatment of mental illness. When Rob was seen by other physicians, including an internist, neurologist, and gastro-intestinal specialist, during the course of his hospitalizations, Lincoln National paid those charges under its major medical provisions, without any limitation. Trial Transcript at 174.

Petitioner argued at trial that severe affective mood disorder, also known as manic depression, was a biological disorder rather than a "mental illness" and that all charges for Rob's treatment should be paid without any limitation for treatment of mental illness. He also contended that the treatment provided to Rob was not "psychiatric care," since the medication could have been prescribed by a family physician or internist.

Petitioner presented no evidence tending to show that laypersons usually classify illnesses by origin or that the average layperson would regard Rob Brewer's condition as anything other than a mental illness. In fact, Petitioner admitted that he had never heard of the alleged link between chemical imbalance and depression

---

[1] References are to Petitioner's Appendix, as well as to the published memorandum of the District Court, *Brewer v. Lincoln National Life Insurance Company*, 730 F.Supp. 292 (E.D.Mo. 1989), and the published opinion of the Eighth Circuit, *Brewer v. Lincoln National Life Insurance Company*, 921 F.2d 150 (8th Cir. 1990).

before Dr. Larocca explained it to him. Trial Transcript at 36. When he read the benefit booklet to determine if Rob's treatment was covered, Petitioner immediately noted the limitation for mental illness and said "it certainly sticks out at you when you read the book." Trial Transcript at 30.

In support of his position, Petitioner presented the testimony of Dr. Larocca and two other psychiatrists, Dr. Hagen and Dr. Harris. All three testified that the precise etiology of mood disorders is unknown, although there is increasing evidence that severe mood disorders have a biological basis. All three recognized, however, that the term "mental illness" is often used broadly, without regard to the origin of the condition. Dr. Larocca had approved the contents of a document distributed to patients, which advised that usually eating and mood disorders are covered under the mental health benefits in an insurance policy. Trial Transcript at 100. Dr. Hagen had himself used the term "mental illness" in an article describing mood disorders in workers who had lost their jobs. Trial Transcript at 66-68. Dr. Harris likewise recognized that the term "mental illness" is used to encompass a large number of illnesses that are biological in origin. Trial Transcript at 124. The psychiatrists agreed that the treatment provided to Rob was psychiatric care. Trial Transcript at 70, 74, 97.

The District Court concluded that Rob's treatment was "psychiatric care" within the meaning of the policy applicable to the first two hospitalizations, whether the Court relied on the expert testimony or on the plain meaning of that phrase. *Brewer v. Lincoln National Life Insurance Company*, 730 F.Supp. 292, 297 (E.D. Mo. 1989);

Pet.App. A-18. However, the Court found that Rob's condition was not a "mental illness" within the meaning of the policy applicable to the third hospitalization. The District Court's Memorandum set forth the expert testimony in some detail, 730 F.Supp. at 295-96, Pet.App. A-13 through A-16, and announced that the Court could look to state law in interpreting the plan language and that any ambiguity would be construed against the insurer in accordance with state law. 730 F.Supp. at 296-97, Pet.App. A-17, A-18. Although there was no evidence that laypersons classify illnesses according to their etiology, the District Court adopted the finding of the District Court in *Kunin v. Benefit Trust Life Ins. Co.*, 696 F.Supp. 1342, 1345 (C.D. Calif. 1988) that "mental illness is often thought of by laypersons as having nonphysical, psychological causes in the Freudian sense, as opposed to an organic basis." 730 F.Supp. at 297. Judgment was entered in favor of Petitioner and against Respondent with respect to the third hospitalization.

On appeal, the Eighth Circuit held that Missouri's contra insurer rule of construction was preempted by ERISA and was not saved as a law regulating insurance, because it was not designed to regulate the insurance industry but was simply a specific application of general state contract principles. *Brewer v. Lincoln National Life Insurance Company*, 921 F.2d 150, 153 (8th Cir. 1990), Pet.App. A-5.

The Eighth Circuit then looked to the language of the plan description, noting that ERISA requires such descriptions to be understood by the average plan participant. The Eighth Circuit observed:

> It would be improper and unfair to allow experts to define terms that were specifically written for and targeted toward laypersons. This requirement provides a source from which we may fashion a federal common law rule; the terms should be accorded their ordinary, and not specialized meanings.

921 F.2d at 154, Pet.App. A-6. The Eighth Circuit also noted:

> By focusing upon the disease's etiology, the district court considered factors that are important to experts but not to laypersons. The court thus failed to examine the term "mental illness" as a layperson would have, which is the examination we conclude ERISA and federal common law require.
>
> Robert C. Brewer's disease manifested itself in terms of mood swings and aberrant behavior. Regardless of the cause of his disorder, it is abundantly clear that he suffered from what laypersons would consider to be a mental illness.

921 F.2d at 154, Pet.App. A-7.

REASONS FOR DENYING THE WRIT

The federal common law rule which the Eighth Circuit announced and applied in this case is the principle, well established both in ERISA cases and state law contract cases, that terms should be accorded their ordinary, and not specialized meanings. 921 F.2d at 154. Because the Eighth Circuit properly gave effect to the plain meaning of the plan language, its discussion of the contra insurer rule did not determine the outcome of the case and was mere dictum.

Each Circuit which has considered the issue has concluded that state laws of contract interpretation are preempted by ERISA. *See Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489, 494 (9th Cir. 1988) *cert. denied*, 492 U.S. 906 (1989); *McMahan v. New England Life Insurance Co.*, 888 F.2d 426, 429 (6th Cir. 1989); *Brewer v. Lincoln National Life Insurance Co.*, 921 F.2d 150, 153 (8th Cir. 1990). The broad preemption language of ERISA, 29 U.S.C. § 1144(a), and the decisions of this Court interpreting that language require that result. *See Pilot Life Insurance Co. v. Dedeaux*, 487 U.S. 41 (1987).

Petitioner relies on *Kunin v. Benefit Trust Life Insurance Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 111 S.Ct. 581 (1990), *reh'g. denied*, 111 S.Ct. 803 (1991), an ERISA case in which the Ninth Circuit held that the contra insurer rule was applicable "regardless of whether it applies as a matter of uniform federal law or because federal law incorporates state law on this point." 910 F.2d at 540. The Eighth Circuit specifically declined to follow *Kunin* in the instant case.

However, the Ninth Circuit's subsequent decision in *Henkin v. Northrop Corp.*, 921 F.2d 864, 969 (9th Cir. 1990) appears to have limited *Kunin's* applicability. Reaffirming the holding in *Kanne* that ERISA preempts state contract interpretation law, the Court in *Henkin* cited *Kunin* for the proposition that there are "instances where preempted state law *might* be incorporated into a uniform federal rule of construction." 921 F.2d at 869. (Emphasis supplied). To date, the Ninth Circuit has not applied its reasoning in *Kunin* beyond the facts of that case, nor has any other Circuit done so.

Even in *Kunin*, the effect of the discussion of the contra insurer rule on the result reached is highly questionable. The Court in *Kunin* noted testimony indicating that "autism is not a mental illness, *in either the lay or the technical sense*." 910 F.2d at 538. (Emphasis added). Given this evidence, the Ninth Circuit, in all probability, would have reached the same result had it applied the same rule applied by the Eighth Circuit in this case: that terms should be accorded their ordinary meaning as ordinarily understood by laypersons.

In these circumstances, this case presents no issue requiring the consideration of this Court.

I. Because The Eighth Circuit Properly Found That The Condition At Issue Was A "Mental Illness" Within The Plain Meaning Of That Phrase, As It Is Understood By The Average Layperson, The Eighth Circuit's Discussion Of The Contra Insurer Rule Did Not Determine The Result In This Case And Presents No Issue Requiring The Consideration Of This Court.

The Eighth Circuit simply applied the well established principle that language in an ERISA plan is to be given its plain and ordinary meaning, as generally understood, without deference to either party. *See Burnham v. Guardian Life Insurance Company of America*, 873 F.2d 486, 489 (1st Cir. 1989) ("straighforward language in an ERISA-regulated policy should be given its natural meaning.")

Because the Eighth Circuit gave effect to the plain meaning of the language used, its discussion of the contra insurer rule is dictum only and does not create a true

conflict with the decision of any other Circuit. As a result, this case does not present an appropriate vehicle for determining whether and in what circumstances the contra insurer rule might apply, if the terms of an ERISA-regulated policy were truly ambiguous. Petitioner's entire argument is based on the erroneous premise that the phrase "mental illness" is ambiguous as applied to manic depression. The Eighth Circuit implicitly rejected that contention.

There are sound reasons for holding that the contra insurer rule is not applicable in cases governed by ERISA. ERISA preempts all state laws of contract interpretation. *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). The contra insurer rule is not saved from preemption, because it does not regulate insurance but is merely a specific application of the rule that a contract will be construed against the party which drafted it. *McMahan v. New England Mutual Life Ins. Co.*, 888 F.2d 426, 429 (6th Cir. 1989). The contra insurer rule is not designed for conflict of interest situations, as Petitioner suggests. (Petition, p. 15). It shifts the burden to the drafter, regardless of whether there is any conflict of interest. The contra insurer rule of construction is not appropriate for ERISA plans. It makes no sense to adopt a rule of interpretation which differentiates between ERISA plans which provide benefits through insurance and ERISA plans which provide benefits through some other means. Rather, an ERISA plan should be interpreted according to its terms, without adopting a rule of construction favoring either party.

The outcome of this case, however, remains the same regardless of whether the contra insurer rule is adopted

in ERISA cases. The contra insurer rule comes into play only when the policy language is found to be *ambiguous*. In the present case, there was no basis for a conclusion that the term "mental illness" is ambiguous as applied to manic depression, also known as affective mood disorder. Manic depression, whatever its origin, would be identified by the average layperson as a "mental illness." It has been so described in numerous court decisions.[2] In Rob Brewer's case, the condition manifested itself in aberrations which the average layperson would view as indicative of "mental illness" – severe depression, contemplation of suicide, hearing voices, retreating into his own world, and "manic" episodes of agitated behavior.

Petitioner sought to create an ambiguity by ignoring the plain meaning of the plan language and introducing expert testimony as to psychiatrists' theories of the origins of manic depression. The District Court, apparently persuaded by that evidence, found that the term "mental illness" was ambiguous. The Eighth Circuit, however, implicitly rejected that conclusion when it looked to the plain language of the plan description, gave that language its ordinary meaning, and concluded that it was "abundantly clear" that Rob Brewer "suffered from what laypersons would consider to be a mental illness." 921

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[2] *See, e.g., United States v. Sullivan*, 544 F.2d 1052, 1054 (9th Cir. 1976) ("witnesses . . . confirmed that Sullivan suffered from manic-depressive psychosis, a mental illness". *See also Tillery v. Owens*, 719 F.Supp. 1256, 1286 (W.D.Pa. 1989), *aff'd*, 907 F.2d 418 (3rd Cir. 1990), (describing "affective or mood disorder manifested by either manic or depressive behavior" as an "incurable but treatable mental illness").

F.2d at 154, Pet.App. A-7. Because the result reached by the Eighth Circuit was based on the plain meaning of the terms used, its discussion of the contra insurer rule was not essential to its decision and the consideration of that issue in this case could result in nothing more than an advisory opinion.

Petitioner is in error in asserting that the Eighth Circuit construed an ambiguous policy term in favor of the insurer. (Petition, p. 20). There was simply no basis for a finding that the term "mental illness" was ambiguous as applied to Rob Brewer's condition, and the Eighth Circuit found no ambiguity.

Petitioner's claim that the decision lessens the protections that formerly existed for participants and beneficiaries of group health insurance policies before passage of ERISA (Petition, p. 13) is likewise erroneous. Insurers which provide health care benefits through ERISA plans must provide the mental health benefits mandated by state statute. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). There is no contention that the mental health benefits provided by Lincoln National's policies were less than those mandated by the applicable Missouri statute. Moreover, the effect to be given plain language is the same, whether a case arises under ERISA or under state contract law. In non-ERISA cases, plain language is always given its plain and ordinary meaning, regardless of whether some different meaning might be more favorable to the beneficiary or insured. The Courts may not create an ambiguity, nor may they rewrite the plain and unambiguous language of the contract. *See Moskowitz v. Equitable Life Assurance Society of the United States*, 544 S.W.2d 13, 20 (Mo. en banc 1976).

Petitioner's suggestion of a conflict of interest between Petitioner and Lincoln National (Petition, pp. 13-14) was not preserved below and presents nothing for review by this Court. In addition, the decision on which Petitioner relies is inapposite. The issue in *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1563 (11th Cir. 1990), was the standard of review applicable where the plan gives the administrator broad discretion to interpret the plan but the administrator also pays the benefits and thus has a potential conflict of interest with the plan participant or beneficiary. The Eleventh Circuit held that while the arbitrary and capricious standard applied, the conflict of interest had to be considered. That issue did not arise in this case because the plan did not give broad discretion to Lincoln National, and the standard of review applied by both the District Court and the Eighth Circuit was the *de novo* standard.

Petitioner in this case sought to narrow the ordinary meaning of "mental illness" by interpreting the plan language in a technical sense, relying on expert testimony which would classify illnesses according to their etiology, and attempting to limit "mental illness" to an illness without an organic basis, although no such limitation appeared in the policy. Since, according to one of plaintiff's experts, every major psychiatric illness known to man can be said to have an organic basis or is suspected of the same, Petitioner's approach would completely nullify the "mental illness" limitations in the plan.

Petitioner's approach is inconsistent with ERISA and the policies behind it. As the Eighth Circuit noted, the meaning of terms used in an ERISA plan cannot be made to depend upon the specialized interpretation which

would be given them by psychiatrists or other members of the medical professions. The average person cannot be expected to interpret his ERISA plan in psychiatrist's terms. ERISA specifically requires summary plan descriptions, such as Petitioner's benefit booklet, to be "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a)(1). A participant or beneficiary is not held to knowledge of technical meanings of terms when the technical meaning would defeat coverage. In the same way, a participant or beneficiary may not rely on technical, specialized meanings to create coverage which is not provided by the plain meaning of the plan language.

It would make no sense to require plan sponsors and administrators to prepare summary plan descriptions in the language normally used by plan participants and then to interpret that language in the technical sense in which it might be understood by some members of a particular profession. Such interpretation could only have the effect of encouraging plan sponsors to use technical, specialized language, contrary to the intent of the statute, as well as to its explicit directive.

Petitioner in this case sought to construe the plan language in a manner contrary to the way it would be understood by the average layperson, in order to obtain a benefit which the average layperson would not expect, based on the plain language of the plan. Because the Eighth Circuit, following well established principles, simply gave effect to the plain language of the plan, this case presents no significant issue which requires determination by this Court.

II. Each Circuit Which Has Considered The Issue Has Held That State Principles of Contract Interpretation Are Preempted By ERISA; The Ninth Circuit's Conclusion In One Decision That The Contra Insurer Rule Was Nevertheless Applicable In That Case Does Not Present A True Conflict Requiring Resolution By This Court

Petitioner asserts that this Court should grant certiorari because of a conflict among the Circuits as to whether the contra insurer rule is preempted by ERISA. On the narrow issue of whether ERISA preempts state laws of contract interpretation, there is no conflict. The Ninth, Sixth and Eighth Circuits, which have considered the issue, have all concluded that it does. In *Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) the Ninth Circuit reversed a District Court decision which had relied on state law rules of contract construction, including the contra insurer rule. *See Kanne v. Connecticut General Life Insurance Co.*, 607 F.Supp. 899, 905 (C.D.Cal. 1985). The Ninth Circuit concluded that California's common law of contract interpretation was preempted by ERISA and was not a law regulating insurance so as to be saved from preemption. 867 F.2d at 494. The Sixth Circuit reached the same conclusion in *McMahan v. New England Mutual Life Insurance Co.*, 888 F.2d 426, 429 (6th Cir. 1989) (Kentucky's contra insurer rule was preempted by ERISA),[3] as did the Eighth Circuit in the present case.

---

[3] After determining that the contra insurer rule did not apply, the Sixth Circuit concluded that the plan language was unambiguous. *McMahan, supra*, 888 F.2d at 430. The Eighth Circuit implicitly reached the same conclusion in this case.

Brewer v. Lincoln National Life Insurance Company, 921 F.2d 150, 153 (8th Cir. 1990) (Missouri's contra insurer rule was preempted by ERISA).

Petitioner relies on *Kunin v. Benefit Trust Life Insurance Co.*, 910 F.2d 534 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 581 (1990), *reh'g. denied*, 111 S.Ct. 803 (1991). There the Ninth Circuit, while recognizing the breadth of ERISA's preemption provisions, held "that the rule of *contra proferentum* applies *to the case at bar*, regardless of whether it applies as a matter of uniform federal law or because federal law incorporates state law on this point." 910 F.2d at 540. (Emphasis supplied.)

While the Ninth Circuit found it unnecessary in *Kunin* to specify the precise basis for its holding, its subsequent decision in *Henkin v. Northrop Corp.*, 921 F.2d 864, 869 (9th Cir. 1990) appears to eliminate the possibility that the state law contra insurer rule might be incorporated into federal law. Attempting to harmonize *Kanne* and *Kunin*, the Ninth Circuit held:

> The contract interpretation law of California is not a law that "regulates insurance," and is therefore preempted by ERISA. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989). There are, of course, instances where preempted state law might be incorporated into a uniform federal rule of construction, *see Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990) . . .

To date, the Ninth Circuit's application of the contra insurer rule in ERISA cases has been limited to the particular circumstances of the *Kunin* case, and the language in both *Kunin* and *Henkin* suggests that it may have no

application beyond that case. No other Circuit has adopted the contra insurer rule in ERISA cases, either as a uniform rule of construction or on any other basis.

The Eighth Circuit expressly declined to follow the *Kunin* court's reasoning and to apply the contra insurer rule. 921 F.2d at 154, n.2. However, because the Eighth Circuit gave effect to the plain meaning of the language used, its opinion does not create a true conflict with the decision in *Kunin*. Even in *Kunin*, the discussion of the contra insurer rule was unnecessary to the Court's conclusion. There was evidence in that case that laypersons, including families of autistic individuals, did not consider autism to be a "mental illness." *Kunin, supra*, 910 F.2d at 536. Accordingly, the result in that case would be the same if the plan language were given its plain and ordinary meaning.

No court has concluded that the type of treatment rendered in this case is anything other than "psychiatric care," nor is there any basis for such a conclusion. *See, Simons v. Blue Cross & Blue Shield*, 144 A.D.2d 28, 536 N.Y.S.2d 431, 434 (1989) ("The plain, ordinary meaning of psychiatric care is the sort of treatment, such as electroshock therapy and psychotropic medication, rendered to a patient who has been admitted to a psychiatric ward to attend to his or her psychiatric disorder.")

The fact that various courts have reached different conclusions concerning whether particular conditions constitute a "mental illness" merely demonstrates that each case must be determined according to the particular condition and plan language involved as well as the

particular circumstances of each case. In *Kunin*, the condition in question was autism, a developmental disability which the Court concluded would not generally be regarded by laypersons as a mental illness. In *Arkansas Blue Cross & Blue Shield, Inc. v. Doe*, 22 Ark.App. 89, 733 S.W.2d 429 (1987), which involved manic depression, both plaintiff and defendant took the position that the terms used in the policy were to be interpreted according to the meaning given them by experts in the field. 733 S.W.2d at 432. That is not the criterion used in ERISA cases, and that case did not involve an ERISA plan. The court in *Rosenthal v. Mutual Life Insurance Co.*, 732 F.Supp. 108 (S.D.Fla. 1990) simply declined to grant summary judgment and did not reach the ultimate question whether manic depression was a mental illness. The *Rosenthal* case did not focus on the plain meaning of the language used but on the use of the term "mental disorder" in the Diagnostic and Statistical Manual of Mental Disorders, DSM-III-R. 732 F.Supp. at 110.

In *Equitable Life Assurance Society v. Berry*, 212 Cal.App.3d 832, 260 Cal.Rptr. 819 (1989), the court did give effect to the plain language of the policy and concluded that every reasonable layman would regard manic depressive illness as a mental disease. In the instant case, amicus curiae solicits this Court to decree that treatment of manic depression be covered under all ERISA plans without regard to any limitation for "mental illness." Such a result is not possible under ERISA.

Whether any ERISA plan provides health care benefits for any particular condition necessarily depends upon the language of the plan. The Eighth Circuit followed the established principle that courts must give effect to the

language of the welfare benefit plan at issue in each case, and its decision presents no issue requiring consideration by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this case does not present questions requiring the consideration of this Court, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

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No. 90-1684

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT P. BREWER, Natural Guardian and Duly-Appointed Next Friend of ROBERT C. BREWER,
Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE CO.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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KS Printing Co. 1991

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No. 90-1684

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert P. Brewer has petitioned this Court to review the Eighth Circuit's decision that ambiguous terms in an ERISA insurance plan are not subject to the axiomatic rule of construction that ambiguous terms in an insurance policy are construed in favor of the insured and against the insurer ("the contra insurer rule"). Respondent Lincoln National Life Insurance Company ("Lincoln National") essentially contends in its Brief In Opposition To Petition For A Writ Of

Certiorari ("Brief In Opposition") that the terms "mental illness" and "psychiatric care," without further definition in an insurance policy and based on their plain and ordinary meaning, are *unambiguous* and not susceptible to more than one interpretation. Accordingly, respondent contends that because the disputed terms allegedly are "unambiguous," this case does not present this Court with occasion to consider the applicability to ERISA plans of a rule of construction for *ambiguous* terms.

I. Because The Term "Mental Illness" *Is* Ambiguous, This Court Should Grant A Writ Of Certiorari And Reach The Questions Presented Regarding The Interpretation Of Ambiguous Terms In An ERISA Plan

This, however, is not a plain language case, notwithstanding respondent's argument. The terms "mental illness" and "psychiatric care" *are* ambiguous, and without further definition in respondent's policy could reasonably be interpreted by the average plan participant and the ordinary person to have meanings other than those advanced by respondent. Without restating arguments in the petition, it should suffice to reiterate that "mental illness" could reasonably be defined in various ways, including definition based upon either *cause* or *symptoms*. To understand the term's inherent ambiguity one need only consider the difficulty other courts have had in interpreting the term "mental illness." In addition to the opposing opinions in this case by the court of appeals and the district court, the *Kunin*, *Rosenthal* and *Arkansas Blue Cross* cases highlight the difficulty courts have had in interpreting "mental illness" or "mental disorder" as advocated by respondent. *See Kunin v. Benefit Trust Life Ins. Co.*, 696 F. Supp. 1342 (C.D. Cal. 1988), *aff'd*, 910 F.2d 534 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990) *reh'g denied*, 111 S. Ct. 803 (1991); *Rosenthal v. Mutual Life Ins. Co.*, 732 F. Supp. 108 (S.D. Fla. 1990);

Arkansas Blue Cross & Blue Shield, Inc. v. Doe, 22 Ark. App. 89, 733 S.W.2d 429 (1987) (en banc).

Lincoln National advances two principal arguments in support of its position that affective mood disorder is plainly a "mental illness" within the meaning of respondent's policies. First, Lincoln National contends that affective mood disorder is a "mental illness" because the symptoms of the illness include an effect upon Rob Brewer's emotions. Lincoln National contends that the cause of the symptoms is irrelevant, even if Rob Brewer's symptoms and illness arise from a physical, organic basis -- a chemical imbalance. Second, respondent advances the premise that the ordinary meaning of medical terms such as "mental illness" must be understood by the average plan participant or layperson in a vacuum and without reference to the current state of scientific and medical understanding. The flaws in the underlying premises for respondent's plain language argument are evident and will be rebutted in turn.

A. The Term "Mental Illness" Is Ambiguous Because It Reasonably Could Be Defined In More Than One Way, Including By Cause *Or* By Symptoms.

First, with reference to the term "mental illness," classification of an illness by symptoms rather than cause is clearly flawed and over-inclusive. Given the brain's physical relationship with the body and the effect of illnesses upon emotions and mental outlook, almost any disorder could be argued to be a "mental illness" under respondent's proposed definition. One need only consider a migraine headache, with its sudden onset, great pain and extended periods of acute and often disabling attack; Alzheimer's disease, with its symptoms of disorientation, forgetfulness, and personality changes; brain cancer, with its unpredictable symptoms that frequently affect behavior; a blood sugar disorder such as hypoglycemia, with its alternating highs and lows of mental and physical activity including euphoria and depression as the blood sugar level

changes. Given this nonexclusive list, it should be apparent that there are many *physical* disorders and illnesses that have effects that manifest themselves with "mental" symptoms. Applying respondent's logic, all of the above diseases or disorders would be excluded from major medical coverage as a "mental illness."

The uncontroverted evidence at trial established that affective mood disorder is a physical problem arising from a chemical imbalance. Evidence accepted by the district court established the reasonableness of distinguishing "mental" illnesses from "physical" illnesses based on their cause and not their symptoms. Clearly, the physical basis for any particular disorder is relevant to whether the disorder should be classified as a "mental illness." Accordingly, an ordinary person might reasonably define "mental illness" by cause rather than by symptoms, and therefore the undefined term "mental illness" is ambiguous.

B. It Is Unreasonable To Exclude A Physician's Knowledge Of Medical Advances From An Ordinary, Reasonable Person's Understanding Of Terms With A Medical Connotation.

Second, Lincoln National's attempt to exclude current scientific and medical knowledge from the common, ordinary meaning and understanding of terms in a health insurance policy inappropriately contorts the meaning of the terms by construing them based on the ignorance, prejudice or superstition of an uninformed population. Respondent's attempt to exclude current technical and medical understanding from the common and ordinarily understood meaning of terms with a medical or technical connotation ignores the physician-patient relationship and the fact that the ordinary person without expertise in medicine would defer to the understanding and explanation of the illness given by his or her doctor. In forming an understanding of an illness, the

ordinary person would consider relevant and adopt any knowledge gleaned from his or her physician.

Respondent's proposed construction of "mental illness" excludes any influence that knowledge gained from a physician may have on the average, ordinary person's understanding of the term "mental illness" and ignores advances in understanding based on medical and scientific discoveries. As set forth in the brief of National Depressive and Manic Depressive Association as Amicus Curiae in Support Of Petition Of Robert P. Brewer For Writ Of Certiorari at 8, diseases such as pneumonia, tuberculosis, influenza, syphilis and cerebral palsy were all at one time or another characterized or commonly thought to be "mental illnesses." Refusing to allow the common, ordinary and reasonable person to understand the true nature of a particular illness based on a technical and current explanation of the present state of medical understanding would operate to retain a common, ordinary meaning based on ignorance and prejudice. Certainly, we live in a rapidly changing world, particularly in the area of medicine and technology. Respondent inappropriately attempts to avoid coverage for a treatable physical ailment, based on outmoded concepts of what is a "mental illness."

C. Based On The Current Level Of Medical Knowledge, As Understood By The Ordinary Reasonable Person, The Term "Mental Illness" Is Ambiguous.

The appropriate legal standard for determining the common, ordinary meaning of medical terms like that at issue in this case is whether reasonable persons who have discussed their problems with their physician would understand affective mood disorder to be a "mental illness." The evidence at trial supported and the district court found that "the ordinary meaning a layperson would give" to the term "mental illness" was "as an illness that 'refers to a behavioral disturbance with no demonstrable organic or physical basis.'"

Brewer v. Lincoln National Life Ins. Co., 730 F. Supp. 292 (E.D. Mo. 1989), reprinted in Appendix B to the Petition at A-19. This Court should agree that the term "mental illness" is ambiguous, susceptible by the reasonable person to more than one meaning, and in particular susceptible to the meaning advanced by petitioner.

II. This Court Should Grant A Writ of Certiorari And Address Whether The Contra Insurer Rule Should Be Applicable To ERISA Insurance Plans.

Accordingly, this is not a plain language case. At issue is the applicability of the contra insurer rule that ambiguous terms in an insurance policy should be construed in favor of coverage of the insured. This axiomatic rule was long ago called "settled" by this Court. *Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 439 (1937); *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U.S. 167, 174 (1923). Incorporation of this "settled" rule into ERISA is important, necessary and desirable as a matter of policy, regardless of whether the vehicle for inclusion is reference to state law or the fashioning of federal common law.

III. Conclusion

The questions presented therefore warrant this Court's grant of a writ of certiorari.

Dated this 13th day of June, 1991.

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IN THE
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October Term, 1990

NO.

ROBERT P. BREWER,
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Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND
BRIEF OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION OF ROBERT P. BREWER FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

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MOTION OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Depressive and Manic Depressive Association ("NDMDA") moves the Court for leave to file the attached

brief in support of the petition of Robert P. Brewer for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, which petition was filed with this court on May 1, 1991. The petitioner has consented to the NDMDA's brief; respondent Lincoln National Life Insurance Company has not.[1]

I. Nature of Applicant's Interest

The issue in this case is whether ERISA[2] requires health insurance companies to recognize manic depression (also known as bipolar affective disorder), an organically caused brain

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[1]NDMDA notes that in the Eighth Circuit, respondent enlisted the support of the Health Insurance Association of America as amicus curiae.

[2]Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

disfunction, as a physical rather than a "mental" illness in determining benefits in employer sponsored group health insurance plans. NDMDA is the primary national organization representing people who suffer from manic depression and the families of those people.

NDMDA has 35,000 members and 205 chapters throughout the United States. There are as many as 2-1/2 million Americans who suffer from organic depressive and manic depressive illness. The insurance industry has traditionally refused to recognize the organic nature of this disease, choosing instead to classify it as a "mental" illness and thus paying the greatly reduced benefits payable for the treatment of ailments described by most insurance policies as "mental illnesses," "mental

or nervous disorders," or similar descriptions.

One of the primary goals of the NDMDA and its members is to achieve affordable health care services and to dispel the ignorance and prejudice that are the root causes of the discrimination that permeates the health insurance industry's disparate treatment of this illness. With proper diagnosis and treatment, most people with manic depression can lead normal, productive lives. Too often, however, the unavailability of adequate health care prolongs accurate diagnosis and prevents appropriate treatment. This tradition of neglect is what NDMDA seeks to reverse as much as it seeks to reverse the Eighth Circuit's decision denying full health care insurance benefits to Mr. Brewer's son.

II. The Individual Petitioner Cannot Speak for Other People With Manic Depression.

Petitioner, like millions of other people who have manic depression, was left to fight a lonely, expensive battle against a major insurance company. To his credit and to the credit of his counsel, he prevailed in the district court. The court of appeals, apparently influenced by the amicus brief filed by the industry trade organization, ignored the trial record and concluded, without any evidentiary support or citation, that illnesses should be classified by symptom rather than by cause. As discussed at greater lenth in the NDMDA's attached brief, this view represents a perpetuation of ignorance and bias against those who have brain disorders, like manic depression, that cause aberrant behavior.

In deciding whether to grant certiorari in this case, this Court should hear not only from the single petitioner and the health insurance industry--it should hear from the millions of Americans who are directly affected by the Eighth Circuit's ruling, especially in light of the confusion that ruling has caused by conflicting with the Ninth Circuit's decision in Kunin v. Benefit Trust Life Insurance Co., 910 F. 2d 534 (9th Cir., 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990).

Moreover, there are a number of cases pending in the federal courts that involve the issue presented in the instant case. NDMDA is sponsoring three class actions filed as a single case in the United States District Court for the Northern District of Illinois (Doe v. Guardian, Case No. 89 C 7955). That

case is currently awaiting ruling on the issue of class certification. NDMDA has been informed that other, individual cases have been filed in other districts. According to the amicus brief filed in the Eighth Circuit by the Health Insurance Association of America, there are "tens of thousands of other policies issued as part of employee benefits plans [that provide] lesser benefits for 'mental illnesses' than for other illnesses."

Obviously, the instant case impacts on far more employers, health insurance companies and beneficiaries than the two litigants in this case.

III. NDMDA Is in a Unique Position to Advance the Reasons This Court Should Grant Certiorari.

As demonstrated above, NDMDA's perspective is much broader than petitioner's individual interest in this litigation. The manifest importance of this case to literally millions of people with manic depression requires resolution of the conflict in the circuits and of the underlying issue that only this court can provide.

IV. CONCLUSION

For the foregoing reasons, NDMDA respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petition of

Robert P. Brewer for a writ of certiorari.

Respectfully submitted,

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BRIEF OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF ROBERT P. BREWER FOR WRIT OF CERTIORARI

This brief is being filed on behalf of the National Depressive and Manic

Depressive Association ("NDMDA") as amicus curiae, pursuant to order of this Court.[1]

I. Interest of the Amicus Curiae

NDMDA is the primary national organization representing people who suffer from manic depression (also known as bipolar affective disorder) and the families of such people. This disease is an organic disfunction that causes a chemical imbalance in the brain. Its symptoms include periods of severe despondency and depression (sometimes suicidal), and other periods of "manic" behavior such as delusions of grandeur and superactivity. The organic nature of this illness has been known for at

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[1]As set forth in NDMDA's attached motion for leave to file, petitioner consented to the filing of this brief; respondent did not.

least three decades, and approximately 80% of the patients with manic depression can be successfully treated with lithium carbonate.[2]

It has been estimated that one percent of the population suffers from manic depressive illness.[3] This translates into 2.5 million Americans who suffer from manic depression. 35,000 of these people, or their family members, are members of NDMDA, which was formed in 1986, and currently has 205 chapters throughout the country.

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[2]Reifman and Wyatt, "Lithium: a Brake in the Rising Cost of Mental Illness," 37 Arch. Gen. Psychiatry 385 (1980); for a comprehensive layman's guide to historical and modern research regarding manic depression, see, Overcoming Depression, Papolos and Papolos (Harper & Row, 1987).

[3]Egeland, et al., "Bipolar Affective Disorders Linked to DNA Markers on Chromosome 11," 325 Nature 783 (1987).

One of NDMDA's primary goals is to achieve affordable health care services for its members and others who suffer from this dreaded illness. A related goal is to destroy the mythology, ignorance and bias that are associated with manic depression, and that lie at the root of the discriminatory practice of the health insurance industry in labeling this disease as "mental," rather than physical, and paying vastly reduced benefits for its treatment.

The conflict between the circuits described in the petition herein has caused great confusion and prejudice to people who suffer from manic depression. After the victories in Arkansas Blue Cross v. Doe, 733 S.W. 2d 429 (Ark. Ct. App. 1987), and Kunin v. Benefit Trust, 696 F. Supp. 1342 (C.D. Cal. 1988), Aff'd, 910 F. 2d 534 (9th Cir. 1990),

cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990), NDMDA and its members had every reason to believe that they would achieve parity with people who suffer from other organic illnesses. After all, health insurance companies have traditionally paid full benefits for brain tumors, cerebral palsy and other organic illnesses that affect the brain.

The Eighth Circuit's opinion from which petitioner seeks a writ of certiorari represents a giant step backward and, as demonstrated below, a gross distortion of the realities of manic depression. NDMDA, therefore, speaks for literally millions of Americans in this effort to convince the Court to grant certiorari and reverse the Eighth Circuit.

II. ARGUMENT

This Court Should Resolve the Conflict in the Circuits by Granting Certiorari and Reversing the Opinion of the Eighth Circuit.

Just when NDMDA and its members thought that it was safe to assume that manic depression had been recognized as a physical, organic illness, unpreventable and chronic, the Eighth Circuit issued an opinion steeped both in ignorance of the record established by petitioner in the district court and in ignorance of the progress made by medical science in the past half century. The most egregious aspect of the Eighth Circuit's opinion, in NDMDA's view, is its conclusion (921 F. 2d at 154):

> "The cause of a disease is a judgment for experts, while laymen know and understand symptoms. Laymen undoubtedly are aware that some mental illnesses are organically caused while others are not; how-

> ever, they do not classify illnesses based on their origin. Instead, lay persons are inclined to focus on the symptoms of an illness; illnesses whose primary symptoms are depression, mood swings and unusual behavior are commonly characterized as mental illnesses regardless of their cause."

With all due respect, this statement is wholly unsupported by the record in this case, and is contrary to modern medical opinion. The Eighth Circuit's decision is wrong, and only this Court can resolve the injustice that it represents.

To be sure, in the dim past, people were institutionalized and branded with such labels as "insane" or "deranged" for aberrant behavior regardless of its cause. People were also thought to suffer and die from "the fever," "consumption," and other illnesses whose cause was unknown to our ancestors;

those illnesses are now known as pneumonia, tuberculosis, and influenza.

More to the point, in the nineteenth century people were institutionalized for "general paresis of the insane," now known as syphilis. As late as 1901, the medical community was debating whether clinical syphilis was caused by, or was the cause of, a "mental illness."[4] Judged by its behavior in the instant case, the health insurance industry would no doubt have sided with those who believed syphilis

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[4]Robert L. Williams, The Horror of Life (Univ. of Chicago Press, 1980), at p. 106. This book describes the treatment (and mistreatment) of syphilis victims among 19th century authors. Such ignorance, tragically, is not relegated to the distant past. As described in the December 27, 1990 Chicago Tribune, as recently as 1975 the Soviet Union classified people suffering from cerebral palsy as "mentally ill" and confined them to psychiatric wards.

was a "mental illness," and paid reduced benefits to its victims.

"Lay persons" and the courts do not and cannot ignore medical evidence relating to the cause of a disease. When the cause is known, illnesses are and should be referred to by the cause, not the symptoms. Manic depression is, without doubt, a physical, organic illness. It is successfully treated with a chemical, lithium, in the vast majority of cases. To hold that this illness should be categorized by its symptoms and not its cause, as the Eighth Circuit has done, reflects an archaic prejudice against people with this disease, and a rejection of medical fact.

Worse yet, the label of "mental illness" attached to victims of manic depression has in many, if not most, cases impeded proper diagnosis and

treatment of this disease because of the practices of health insurers like respondent in this case. Without proper medical care, often costly but just as often effective, millions of Americans will suffer needlessly.

The health insurance industry argues that such coverage will increase premiums. If this is true, NDMDA says so be it. The treatment of cancer, heart disease and AIDS also increases premiums. Certainly, the AIDS epidemic could not have been anticipated by the health insurance industry, and the long term, intensive treatment of that illness no doubt increased premiums unexpectedly. The health insurance industry, however, has no such excuse for not anticipating the incidence and treatment of manic depression, the cause

and effective treatment of which has been known for decades.

In any event, the scope and duration of this debate indicate the importance of this case far beyond the two litigants in the court below.[5] NDMDA submits that the vast number of people affected by the decision of the Eighth Circuit, the conflict between that decision and the decisions of other courts, and the importance of interpreting ERISA as it relates to these questions compels the granting of certiorari.

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[5]Indeed, the amicus brief filed below by the Health Insurance Association of American admits that there are "tens of thousands of other policies issued as part of employee benefits plans [that provide] lesser benefits for 'mental illnesses' than for other illnesses."

III. CONCLUSION

For the foregoing reasons, NDMDA supports the petition of Robert P. Brewer for a writ of certiorari to the Eighth Circuit, and the reversal of the ruling below.

Respectfully submitted,

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